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## Subjects of International Law: A Power-Based Analysis

Guido Acquaviva

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# Subjects of International Law: A Power-Based Analysis

Guido Acquaviva\*

## ABSTRACT

*In this Article, the Author challenges the definition of the term “state” that is commonly accepted in legal scholarship as the basis for assessing whether an entity is a subject of international law. By analyzing a number of cases that do not fit into the “traditional” model—including the Holy See, Napoleon, and the Confederacy—the Author reaches the conclusion that the only essential element of a subject of international law is its sovereignty. An entity is sovereign when it is able effectively to assert that it is not subordinate to another authority: territory and population are therefore not essential attributes of international personality. The Author also explores the close relationship between the status of an entity as a subject of international law and international responsibility. The conclusions and analytical approaches employed in the Article are applicable to the study of entities long considered “lesser” subjects than states, such as intergovernmental organizations, insurgents, or belligerents, and even to the analysis of contemporary terrorist networks such as al-Qaeda.*

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*Non sunt multiplicanda entia praeter necessitatem.*  
Ockham's Razor

## I. INTRODUCTION

The idea that states are the primary subjects of international law stems from the fact that they appear to constitute the most complete type of subject, having a more or less stable authority over a generally well-defined territory and population. Arguably, this cannot be said for entities such as international organizations, which generally lack a territorial basis, or of belligerents, which are not deemed to possess the quality of a stable authority.

This Article aims to challenge the idea that since states are the primary subjects of international law,<sup>1</sup> they are *qualitatively* different

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1. Practically all scholars dealing with the issue of subjects of international law hold this view. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 58 (6th ed. 2003); DOMINIQUE CARREAU, *DROIT INTERNATIONAL* §§ 813-816 (7th ed.

from other subjects of international law. If proved, this proposition would entail that non-state actors have, in principle, the same rights and obligations as states under customary international law.<sup>2</sup> The fundamental consequence would be the need to rethink the way in which the international community regards non-state actors.

Part II of this Article first addresses the most common definition of “state” under international law. It also identifies a number of borderline cases in which subjects of international law not falling within that definition raise interesting questions as to the propriety of using this definition in deciding whether a certain entity is a subject of international law. These cases, although admittedly few, are assumed to be representative of a larger number of similar instances. Although these instances vary greatly in nature, they all point to the same conclusion. Also, they are gathered from different time periods, because the assumption is that the fundamental rules of international law relating to the personality and identity of subjects have not changed during the past centuries.

Part III of this Article then proposes a more general definition of subjects of international law, a definition capable of easing the incongruities raised by the examples discussed in Part II. In particular, it suggests that for an entity to be considered a subject of international law, the entity must be able to assert effectively that it is not subordinate to another authority; in other words, it must have the ability not to recognize any entity as a superior. Such a status—defined as sovereignty<sup>3</sup>—is established through the analysis of that entity’s powers within the entity itself and, under certain circumstances, of its relations with other subjects of international law.

Part IV of the Article explores the real basis for this definition and puts forward the view that a close link exists between theories of

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2001); GEORG DAHM ET AL., 1 VÖLKERRECHT 125 (1989); LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 241 (3rd ed. 1993); STARKE’S INTERNATIONAL LAW 85 (I.A. Shearer ed., 11th ed. 1994); JOE VERHOEVEN, DROIT INTERNATIONAL PUBLIC 49-50 (2000); Colin Warbrick, *States and Recognition in International Law*, in INTERNATIONAL LAW 205 (Malcolm D. Evans ed., 2003).

2. See, e.g., CARREAU, *supra* note 1, § 816. In fact, “[t]he monolithic view of statehood upon which traditional international law doctrine depends significantly limits the scope of international law. One consequence is that it establishes a model for full international personality that other claimants for international status cannot replicate.” HILLARY CHARLESWORTH & CHRISTINE M. CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW 125 (2000).

3. Although virtually every definition of the term “sovereignty” has been challenged, its use as a synonym of “independence” to explain the “Grundnorm” of international relations has been dominant at least since the end of the eighteenth century. See, e.g., Stéphane Beaulac, *Emer de Vattel and the Externalization of Sovereignty*, 5 J. HIST. INT’L L. 237, 286-92 (2003). The fact that sovereignty is a complex concept, pervaded by political and other considerations, is also suggested in James Rosenau, *Sovereignty in a Turbulent World*, in BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 191 (Gene Lyons & Michael Mastanduno eds., 1995).

personality under international law, on the one hand, and international responsibility, on the other. Finally, the conclusions in Part V address the potential significance of the application of the findings presented in the previous parts to cases that do not apparently harmonize with the traditional view of international subjects.

## II. STATE ACTORS?

### A. Attempting to Define "State"

The *Restatement (Third) of Foreign Relations* explains: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."<sup>4</sup> This definition is fundamentally consistent with the one contained in the Montevideo Convention on the Rights and Duties of States, which provides that "[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States"<sup>5</sup> and is referred to by scholars, especially in the United States, as indicative of customary international law.<sup>6</sup> The aforementioned elements are often defined "requirements" or "essential conditions" for an entity to be regarded as a state under international law.<sup>7</sup>

This definition is not satisfactory. First, part of the definition requires that the entities with which a state engages in formal relations be states themselves. But because they can only be states if they are able to have relations with other such entities, a vicious circle seems unavoidable. It seems difficult to characterize the capacity to engage in formal relations as an essential element, if only

4. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 (1987).

5. Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 165 L.N.T.S. 19, reprinted in 28 AM. J. INT'L L. 75 (Supp. 1934) [hereinafter Montevideo Convention].

6. See Thomas D. Grant, *Defining Statehood: the Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 405-22, 435-47 (1999) (explaining different definitions of state and the insufficiencies of the definition enshrined in the Montevideo Convention).

7. See, e.g., HENKIN ET AL., *supra* note 1, at 246; Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, in 281 HAGUE ACADEMY OF INTERNATIONAL LAW COLLECTED COURSES 9, 96 (1999); see also I.I. LUKASCHUK, *MEZHDUNARODNOE PRAVO* 293 (1999) (evidencing that Soviet and Russian legal literature identifies these three elements as "making up" the state).

because this would entail the need to pre-define whether the other entities are already states.

The Comment to the *Restatement* further cautions that, although the definition is generally accepted, “each of its elements may present significant problems in unusual situations.”<sup>8</sup> If a definition is generally accepted, but *each* of its elements is put into doubt in borderline situations, the solution would be to look for a better definition, not to try to force unusual situations to conform to the legal definition.<sup>9</sup> Uncommon situations test the veracity and reliability of the definition itself, at least if the definition is to serve any practical purpose.<sup>10</sup>

Also, the definition does not place enough emphasis on the element of “external” sovereignty. The expression “under the control of its own government” in the *Restatement* may admittedly refer to this requirement, but it is insufficient to identify properly this feature. In fact, federated states may be said to rule a defined territory and population, and some of them are allowed to enter into relations with other subjects—in certain cases even with other subjects of international law. They are not, however, states within the meaning of international law. In the case of federated states, it is their lack of independence with regard to the federal state that prevents them from being considered subjects of international law. This is the case, for example, for the states and territories of the United States,<sup>11</sup> or the republics making up the former Soviet Union until 1991. The latter is especially interesting because, notwithstanding the fact that Byelorussia (now Belarus) and the Ukraine were among the founding members of the United Nations—an organization that is open only to “states” pursuant to a joint reading of articles 3 and 4 of its Charter—none of the republics constituting the U.S.S.R. was a state within the meaning of international law.<sup>12</sup>

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8. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 cmt. a (1987).

9. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 217 (5th ed. 2003) (stating that “whether or not the entities discussed above constitute international persons or indeed states or merely part of some other international person is a matter for careful consideration in the light of the circumstances of the case . . .”).

10. Such as including some entities within the category and excluding others.

11. In *United States v. Belmont*, the U.S. Supreme Court applied this rule of international law, stating that “the external powers of the United States are to be exercised without regard to state laws or policies. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.” 301 U.S. 324, 331 (1937).

12. See BRUNO SIMMA, *THE CHARTER OF THE UNITED NATIONS – A COMMENTARY* 156 (1994). It has been suggested by local scholars that the two Soviet republics indeed did play a certain role in international relations thanks to their membership in various U.N. bodies. See Svetlana Svilas, *Istoriografija i istochniki po istorii vneshnepoliticheskoj deiatelnosti BSSR v 1954-1990 gg.*, 2003(4) *BELARUSSIAN JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 40. The example of

It is therefore difficult to accept the *Restatement's* definition of a "state" under international law. But it will be assumed that this definition describes what a state in the sense of international law looks like. Throughout this Article, this description of the state will be identified as the "traditional" way to address the problem of statehood in international law—this being the view widely held in the past decades, especially among U.S. scholars.

### B. Recognition

Before introducing the cases, a short explanation of the phenomenon of recognition is also necessary. "Recognition of governments" denotes the act through which it becomes apparent that a subject of international law is willing to enter into certain relations with another authority.<sup>13</sup> Many states today assert that they do not intend explicitly to recognize governments.<sup>14</sup> "Recognition of states" is the act through which a subject of international law indicates its willingness to enter into inter-state relations with another subject of international law and thus is evidence—but not proof—that the latter has acquired international personality.<sup>15</sup> Recognition may be explicit—through an official statement issued by the recognizing authority—or, more often, implicit—through some other act presupposing recognition that the other entity is a subject of international law.<sup>16</sup>

There are two fundamental reasons why recognition may not establish the international personality of states and other subjects. First, the principle of the sovereign equality of the subjects of international law would be infringed by the possibility that one or more subjects could deny the existence of another subject by refusing to recognize it.

Second, it is illogical—and ultimately impractical—to allow an entity to be considered a subject of international law by some subjects but not by others. Since, for example, it is common that a newly

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Byelorussia and the Ukraine as founding members of the United Nations is particularly curious in view of the letter dated February 10, 1945 by Franklin D. Roosevelt, President of the United States, to Joseph V. Stalin, Secretary-General of the U.S.S.R. Communist Party, suggesting that the U.S. should *also* be given two additional votes in the General Assembly. Stalin apparently assented to this view, but the United States did not pursue the matter further. The letter by Stalin, with reference to the previous correspondence, is reprinted in EDWARD R. STETTINIUS, JR., *ROOSEVELT AND THE RUSSIANS* 283 (Walter Johnson ed., 1949).

13. STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW* 269 (Ian Brownlie ed., 1998).

14. *Id.* at 3-5.

15. See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW* 48-49 (2001); MARIO GIULIANO ET AL., *DIRITTO INTERNAZIONALE (PARTE GENERALE)* 84-96 (1991).

16. See, e.g., CASSESE, *supra* note 15, at 48-49; GIULIANO ET AL., *supra* note 15, at 84-96.

created state is not immediately recognized as a state by the international community as a whole, the absurd result would follow that an effective and independent government over a population and a territory would be considered a state by some subjects, but as non-existent—within the international realm—by others. It is not clear with which rules of customary international law an entity lacking unanimous recognition would be bound to comply.<sup>17</sup> This means that an independent authority, existing as a matter of fact,<sup>18</sup> is thereafter recognized by other subjects wishing to enter into some kind of intercourse with it; such recognition, however, has no bearing on the fact that this subject already exists and is part of the so-called “international community.” Independence as the essential attribute of all subjects of international law—a topic further analyzed in this Article—also demonstrates that recognition is not a requirement for a state to be a subject of international law.<sup>19</sup>

In 1991, the European Community issued “guidelines” for the recognition of republics aspiring to independence during the process of the dissolution of the Soviet Union and Yugoslavia in the early

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17. See CASSESE, *supra* note 15, at 48-49; GIULIANO ET AL., *supra* note 15, at 84-96; see also HANS Kelsen, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS ch. 8 (1920).

18. In *Russian Reinsurance Co. v. Stoddard*, the court stated:

The fall of one governmental establishment and the substitution of another governmental establishment which actually governs; which is able to enforce its claims by military force and is obeyed by the people over whom it rules, must profoundly affect all the acts and duties, all the relations of those who live within the territory over which the new establishment exercises rule. Its rule may be without lawful foundation; but lawful or unlawful, its existence is a fact and that fact cannot be destroyed by juridical concepts.

240 N.Y. 149, 158 (N.Y. 1925).

19. It is sometimes suggested that, for example, Member States of the European Union are not fully sovereign in that decisions of organs such as the European Commission or the European Court of Justice have supremacy and direct effect within their territories. See, e.g., Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POLY 373, 376-77 (2003). But because a state *has given its consent* to be bound by treaties or by decisions of other subjects of international law and can withdraw its consent, it remains a subject of international law regardless of these self-imposed limitations. The power of these organs is a mere product of an agreement between states: the authority of the organization's acts derives from the founding treaty. See Gaetano Arangio-Ruiz, *Dualism Revisited. International Law and Interindividual Law*, 86 RIVISTA DI DIRITTO INTERNAZIONALE 909, 998 (2003) [hereinafter Arangio-Ruiz, *Dualism Revisited*]. In fact, the principle *nemo plus iuris transferre potest quam ipse habet* and its corollaries have been recognized since the *Wimbledon Case*, when the Permanent Court of International Justice stated that “[n]o doubt any convention creating an obligation . . . places a restriction upon the exercise of the sovereign rights of the State. . . . But the right of entering into international engagements is an attribute of State sovereignty.” S.S. *Wimbledon* (Gr. Brit., Fr., Italy, Japan, Pol. v. F.R.G.), 1923 P.C.I.J. 25 (ser. A) No. 1 (Aug. 17).



1990s.<sup>20</sup> Contrary to commonly held belief,<sup>21</sup> these guidelines do not show a novel approach, but rather follow the long-standing practice of trying to impose specific obligations on new subjects. To mention only one example, following the Bolshevik revolution in Russia in 1921, the French Minister of Foreign Affairs declared that

Le gouvernement français n'a pas l'intention de reconnaître le pouvoir des soviets tant que celui-ci n'aura pas donné des garanties de sa volonté de se conformer au droit des gens et de respecter les engagements et les obligations des Gouvernements russes qui l'ont précédé à l'égard des gouvernements et des particuliers étrangers.<sup>22</sup>

Whether or not the proponents of such statements actually abided by them, the purported aim appears to be the same: setting standards for governments to be recognized within the "family of the nations."<sup>23</sup> But these kinds of declarations by (older) members of the international community imply that the new entities are already

20. The Declaration on Yugoslavia was issued at the Extraordinary Ministerial Meeting held on December 16, 1991, in Brussels. See European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, Dec. 16, 1991, 31 I.L.M. 1485. It contained the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, where EC Member States agreed to

recognise, subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

*Id.*

21. See, e.g., Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 66 n.374 (1998); Marc Weller, *Current Development: the International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM J. INT'L L. 569, 587-88 (1992). But see Martii Koskeniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455, 490 n.54 (1996) (suggesting that this approach to the recognition of states constitutes a "resuscitated" approach).

22. *Answer by the representative of the French Government during a parliamentary debate, 5 January 1921*, in ALEXANDRE CHARLES KISS, 2 RÉPERTOIRE DE LA PRATIQUE FRANÇAISE EN MATIÈRE DE DROIT INTERNATIONAL PUBLIC 385 (1966).

23. The same applies to decisions of "non-recognition" by the United Nations. See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 58 (June 21) (holding that U.N. Member States must "recognise the illegality of South Africa's presence in Namibia" and refrain from acts implying recognition of the South African government's authority over that territory). This decision, not based on general international law but binding only Member States of the United Nations under article 25 of the U.N. Charter implies that, pursuant to the principle *pacta tertiis nec nocent nec prosunt*, absent the Security Council's binding statement, states would retain their freedom to recognize or not. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 131 (July 9) (separate opinion of Judge Higgins), available at <http://www.icj-cij.org>; SIMMA, *supra* note 12, at 407-09, 416.

subjects of international law. No state would ask entities that are not already subjects of international law to undertake international legal obligations. An entity has certain rights and obligations only because it already *is* a subject; others may wish to force compliance under the threat of non-recognition from a political standpoint, and therefore isolation, but this stand does not, and may not, affect the legal personality of those new entities.<sup>24</sup> To hold the contrary, one would need to argue that an entity lacking the quality of a subject of international law—and not enjoying the rights and duties thereof—acquires that status by starting to comply with the legal obligations of a subject, which it still is not. Such reasoning leads to the absurd result that an entity would only become a subject of international law when it finally complies with those duties, and its conduct is finally acknowledged by others (a process that might take considerable time).

Similarly, continued recognition of entities that have ceased to fulfill the requirement of effectiveness and independence shows that sometimes recognition is not based on any consistent set of empirical criteria, but rather on the acceptability of that entity “to current international mythologies of legitimate statehood.”<sup>25</sup> This is another reason not to assign excessive importance to recognitions.

### C. *Atypical Quasi-State Actors?*

A first critique of the traditional model of the international community relies on the acknowledgement that there are certain actors of international law that are treated like states (and are even sometimes defined as states), although they do not meet all the criteria that are traditionally deemed necessary for them to be called states. The following pages contain an analysis of various such cases.

#### 1. The Holy See

“When I request an audience from the Vatican, I do not go to see the King of Vatican City, but the head of the Catholic Church.”<sup>26</sup> This statement by Dag Hammarskjöld, Secretary-General of the United Nations between 1953 and 1961, describes the paradox of the

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24. In this Article, the terms “subject” and “actor” of international law are used as synonyms. *But see* Pierre-Marie Dupuy, *Sur les Rapports entre Sujets et “Acteurs” en Droit International Contemporain*, in *MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE* 261 (Lal Chand Vohrah et al. eds., 2003).

25. CHRISTOPHER S. CLAPHAM, *AFRICA AND THE INTERNATIONAL SYSTEM: THE POLITICS OF STATE SURVIVAL* 14 (1996) (emphasis omitted).

26. EDWARD GRATSCHEV, *THE HOLY SEE AND THE UNITED NATIONS 1945-1995* 10 (1997).

relationship among the Holy See, the Vatican, and the Catholic Church. The Roman Pontiff, supreme head of the Catholic Church, has occupied a position of high political authority since the Middle Ages and, through the vicissitudes leading to the end of the "universal" rule of the Holy Roman Empire and the gradual formation of a community of sovereign entities, has acquired a status equal to that of a head of state.<sup>27</sup>

Part of the confusion stems from the fact that the Pontiff has, for most of the existence of the Holy See, ruled the Papal States situated in central Italy. Only for a certain period after 1808, and then again between 1870 and 1929, did the Pontiff have no jurisdiction over any territory at all.<sup>28</sup> Following the signature of the Lateran Treaty, the Pontiff now rules the Vatican City.<sup>29</sup> But these changes in territorial control (or lack thereof) have not affected in any sense the international personality of the Holy See. After the conquest of the Papal States by Napoleon in 1808, a concordat—a real international agreement between sovereign subjects<sup>30</sup>—was signed by Napoleon and the Pope, ensuring the exercise of the activities of the Pontiff "in the same forms of his predecessors," as well as the right to receive and appoint ambassadors.<sup>31</sup> Even after the conquest of Rome by the

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27. On this issue, see the decision issued by the Italian Court of Cassation, 5<sup>th</sup> section (penal), on July 17, 1987 in the case *In re Marcinkus et al.*, 1988 RIVISTA DI DIRITTO INTERNAZIONALE 216. According to the court:

[O]f no importance, for the purpose of this decision, is the examination of the causes, of the reasons and of the historical origins of the present position of the Holy See, within the international legal order. . . . The only determining and relevant issue to evaluate is, in this matter, its undisputed and undisputable nature of subject of international law.

*Id.* (translated by author).

28. See 2 J.H.W. VERZIJJ, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 295-97 (1969).

29. See Treaty of the Lateran, Feb. 11, 1929, Italy-Vatican City, O.V.T.S. 161, Europ T.S. No. 590019, reprinted in 23 AM. J. INT'L L. 187 (Supp. 1929) [hereinafter *Lateran Treaty*]. Article 2 of the Lateran Treaty provides, "Italy recognises the sovereignty of the Holy See in international matters as an inherent attribute in conformity with its traditions and the requirements of its mission to the world," and article 3 states, "Italy recognises the full ownership, exclusive dominion, and sovereign authority and jurisdiction of the Holy See over the Vatican as at present constituted, together with all its appurtenances and endowments, thus creating the Vatican City, for the special purposes and under the conditions hereinafter referred to." *Id.*

30. Concordats are international treaties relating to the status of the Roman church and its ministers and to matters of cult within the territory of the states with which they are concluded, and they are therefore distinguishable on grounds of their content, not of their nature. See Gaetano Arangio-Ruiz, *On the Nature of the International Personality of the Holy See*, 1996 REVUE BELGE DE DROIT INTERNATIONAL 354, 365.

31. Concordat of Fontainebleau of January 25, 1813, 5 Martens Recueil des Traités 552 (Supp. I).

Italian state in 1870, the Holy See continued to maintain its activities and relations with other subjects of international law as if nothing had changed.<sup>32</sup>

The Holy See is currently party to various conventions, including the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864,<sup>33</sup> the Geneva Conventions of 1949,<sup>34</sup> the Convention on the Rights of the Child of 1989,<sup>35</sup> and the Vienna Convention on Diplomatic Relations.<sup>36</sup> The Holy See is a member of the World Intellectual Property Organization,<sup>37</sup> a member of the International Atomic Energy Agency,<sup>38</sup> and has the status of the only "Non-member State Permanent Observer to the United Nations."<sup>39</sup> These facts show that, regardless of the doctrinal differences and theories, the Holy See—though not a state under the definition of the

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32. See the ruling by the Italian Court of Cassation, 1<sup>st</sup> section (civil) of December 3, 1988, (reprinted in ALBERTO MIELE, 2 *LA COMUNITA' INTERNAZIONALE (I SOGGETTI)* 67 (2000)), holding that "the Holy See has survived as a subject of international law to the extinction of the Pontifical state due to *debellatio*, occurred in 1870 as a consequence of the annexation of Rome by the Italian state" (translated by author). See also Josef Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 308, 312 (1952) (noting that during the period 1870-1929, the Pope acted as an international mediator between Germany and Spain and as an arbiter between Haiti and Santo Domingo; during the First World War, the Holy See had vessels with its own flag declared neutral in the hostilities).

33. For the original French text of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864, see 129 Consol. T. S. 361, 362. For the status of ratifications, see <http://www.icrc.org> (last visited Nov. 2004).

34. For the text of the Geneva Conventions of 1949, see 75 U.N.T.S. 31, 85, 135, 287. For the status of ratifications, see <http://www.icrc.org> (last visited Nov. 2004).

35. For the text of the Convention on the Rights of the Child of 1989, see 28 I.L.M. 1448. For the status of ratifications, see <http://www.icrc.org> (last visited Nov. 2004). The United States of America and Somalia are the only countries that have not ratified the Convention.

36. For text of the Vienna Convention on Diplomatic Relations, see 500 U.N.T.S. 95. It was already at the Congress of Vienna of 1815 that the "Règlement on the Precedence of Diplomatic Agents" was drafted, which "n'apportera aucune innovation relativement aux Représentants du Pape." See 64 Consol. T.S. 2.

37. For the text of the Convention establishing the World Intellectual Property Organization, see 828 U.N.T.S. 3. For the members of the organization, see <http://www.wipo.int> (last visited Nov. 2004).

38. For the Statute of the International Atomic Energy Agency, see 276 U.N.T.S. 3 and subsequent amendments. For the members of the organization, see <http://www.iaea.org> (last visited Nov. 2004).

39. See <http://www.un.org/Overview/missions.htm#nperm> (last visited in Nov. 2004). On July 1, 2004, the U.N. General Assembly expanded the possibilities of participation in the organization by the Holy See; the Holy See is now allowed to participate in the Assembly's general debate (after the last member on the list), to respond to speeches made during debates, to circulate its communications directly as official documents of the organization, to co-sponsor draft resolutions, and to raise a "point of order" during committee meetings. See G.A. Res. 314, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/314 (2004).

Montevideo Convention—is considered, in essence, an equal to states—*par inter pares*.<sup>40</sup>

The Holy See is the government of the Church and, de facto, also of the minuscule city of the Vatican; there is no reason to create complex theories on the relationship among these three bodies. The Vatican City lacks independence and is an entity governed by the Holy See: it is therefore not a subject of international law. It is true that, on some occasions, the Holy See prefers to deal with certain matters of its own through the Vatican state.<sup>41</sup> But if one is to go beyond mere appearances, it is evident that the real subject on the international plane is the Holy See, which effectively controls the Vatican City (a mere territorial administration) and the Catholic Church (the world-wide network of persons and institutions). An example clarifies this apparent confusion. In 1993, the Holy See and Israel signed a treaty which, in addition to mutual recognition and the establishment of diplomatic relations, relates to the regime of the Catholic Church on Israeli territory.<sup>42</sup> Article 1.2 of the treaty states “[t]he Holy See . . . affirms the Catholic Church’s commitment to uphold the human right to freedom of religion and conscience, as set forth in the Universal Declaration of Human Rights and in other international instruments to which it [the Holy See] is a party.”<sup>43</sup> Thus, the parties agreed that the Holy See was the subject of international law capable of assuming binding obligations *on behalf of the Catholic Church*.

The Holy See, in sum, is a subject of international law equal to states, even if it does not possess the traditional elements of statehood. It is the same subject as the Holy See before 1808, the same subject as that which existed between the fall of Napoleon and 1870, and the same subject as that which existed between 1870 and 1929. Changes in territory and population have not affected its nature as a sovereign subject.<sup>44</sup> Currently, the expression “Holy See”

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40. See Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on Defence Motion to Obtain Cooperation from the Vatican Pursuant to Article 28 (Trial Chamber I, I.C.T.R. 2004) (treating the Vatican as a sovereign state, over which the Charter of the United Nations, and the Statute of the Tribunal, does not—may not—impose obligations). Although the reference in the decision is to the Vatican state, the request regarded cooperation by the “former Ambassador of the Holy See to Rwanda,” and it is apparent that “Holy See” and “Vatican” are used by the Trial Chamber as interchangeable terms. For the text of the Decision, see <http://www.ictr.org> (last visited Nov. 2004).

41. This seems the case of treaties having specific territorial application. See HENKIN ET AL., *supra* note 1, at 299.

42. Fundamental Agreement Between the Holy See and the State of Israel, Dec. 30, 1993, Vatican-Isr., 33 I.L.M. 153 (1994).

43. *Id.* at 154.

44. A similar analysis applies to the less famous case of the Sovereign Order of Malta. See MALCOLM N. SHAW, INTERNATIONAL LAW 171 (4th ed. 1997). For example,

is used to define the government of the Vatican. Should the Holy See once again lose its territorial basis, however, it would still remain a subject of international law in its own right.

## 2. The Boers

One case of an entity subject to international law that *moved* from one territory to another—and therefore cannot be said to have possessed “a stable territory”—is exemplified by the “Great Trek” of the Boers in the first half of the nineteenth century.<sup>45</sup> The Cape of Good Hope was settled by the Dutch in 1652 and, with some minor interruptions stemming from colonial conflicts, remained a Dutch dependency until 1806.<sup>46</sup> Movements of Boer farmers from the Dutch Colony of the Cape to the North were common throughout the eighteenth and the beginning of the nineteenth centuries. It was, however, after the cession of the colony to Great Britain in 1814, and especially after the abolition of slavery in 1833, that almost the entire African-Dutch community moved to form the Free State of Orange,<sup>47</sup> the African-Dutch Republic,<sup>48</sup> and the Colony of Natal.<sup>49</sup> Those settlers, according to the traditional view, would not have been able unilaterally to discard their bond of allegiance to the British Crown in accordance with domestic (British) rules.<sup>50</sup> Had this been a simple occupation of *terra nullius*, the new territory would automatically have become part of the British Empire. But the emigrants intended to reestablish their colony on an independent basis, with the privileges and liberties the new British sovereign denied them (including that of being a slave-owner).

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the Order of Malta was invited to the Geneva Conference of 1929, convened under the auspices of the Red Cross on the prisoners of war; it was not invited to the Universal Postal Union Conference of 1937. See PAUL GUGGENHEIM, *RÉPERTOIRE SUISSE DE DROIT INTERNATIONAL PUBLIC: DOCUMENTATION CONCERNANT LA PRATIQUE DE LA CONFÉDÉRATION EN MATIÈRE DE DROIT INTERNATIONAL PUBLIC, 1914-1939* 498-99 (1975); see also *CASES AND MATERIALS ON INTERNATIONAL LAW* 152 (Martin Dixon & Robert McCorquodale eds., 4th ed. 2003) (quoting an Italian judgment on the status of the Order of Malta).

45. See J. Westlake, *L'Angleterre et la République Sud-Africaine*, 28 *REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE* 268, 269-72 (1896).

46. JOHN DUGARD, *INTERNATIONAL LAW – A SOUTH AFRICAN PERSPECTIVE* 14-15 (2000).

47. See Westlake, *supra* note 45 (noting that this entity maintained its external independence until 1881 when the Pretoria Convention made it a British protectorate).

48. Later, this entity became the Republic of South Africa and was annexed by Great Britain as Transvaal in 1877. *Id.*; see also JOHN NIXON, *THE COMPLETE STORY OF THE TRANSVAAL* 12-21 (1885).

49. Natal was annexed by the British government at the Cape in 1843. NIXON, *supra* note 48, at 19. See generally M. J. De Louter, *L'annexion du Transvaal*, 13 *REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE* 194 (1881).

50. See VERZIJJ, *supra* note 28, at 65.

Leaving aside any moral judgment on the Boers' aims,<sup>51</sup> there is no doubt that other countries recognized these entities as subjects of international law because they effectively discharged state functions in their respective territories until their final annexation by Great Britain. In fact, the domination by the Netherlands through its East India Company was a nominal one, allowing for a high degree of de facto self-government.<sup>52</sup> When British rule replaced the nominal Dutch authority, it was simply not recognized by the local ruling class of Dutch origin.<sup>53</sup> The manifesto describing the intentions of the emigrants, drafted in 1837, is clear in this respect, stating that "we are resolved, wherever we go, that we will uphold the first principles of liberty" and that "we quit this colony under the full assurance that the English Government has nothing more to require of us, and *will allow us to govern ourselves without interferences* in the future."<sup>54</sup> The Boers believed that they "were an oppressed nation under foreign supremacy."<sup>55</sup> As such, they moved to another territory to retain their own identity. The British government recognized that the Transvaal was constituted by the "emigrant farmers beyond the Vaal river."<sup>56</sup>

In this case, the nation (or rather, the white governing elite) moved with its property (including slaves) to an altogether different territory, maintaining an identity recognized by Great Britain and other nations. The government—with its legal system and constitutive rules—and the population changed location, but both kept their identity. In response to this reasoning, it might be said that because the Boers were colonists under Dutch rule, they could not be an entity under international law before the Great Trek; therefore, it is impossible to define their migration as a modification of the territory of a subject of international law. The better view, however, is that Dutch rule was more formal than effective and that subsequent history demonstrates that the Boers left in order to maintain the integrity of their traditions and institutions. Moreover, when the Boer entities formed *after* the Great Trek ahead of the still-advancing British presence, they began to withdraw beyond the river Vaal. In

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51. See Tamara Rice Lave, Note, *A Nation at Prayer, a Nation in Hate: Apartheid in South Africa*, 30 STAN. J. INT'L L. 483, 486-91 (1994) (analyzing the roots of South African apartheid policies).

52. See NIXON, *supra* note 48, at 14.

53. *Id.* The Dutch-speaking group in South Africa actually also includes descendants of French Huguenots and Germans. See FRANK CANA, *SOUTH AFRICA — FROM THE GREAT TREK TO THE UNION* 5-23 (1909); T.R.H. DAVENPORT, *SOUTH AFRICA: A MODERN HISTORY* 6-8 (4th ed. 1991).

54. DAVENPORT, *supra* note 53, at 16-17.

55. *Id.* at 18.

56. See NIXON, *supra* note 48, at 339-41.

this instance, a real migration of an internationally constituted entity, exercising effective authority over its subjects, took place.<sup>57</sup>

The foregoing case shows that "the *total change* of territory by a people which, under the same government and law, settles in a different territory, leaves the identity of the state [or of the subject] intact."<sup>58</sup>

### 3. Czechoslovakia

Czechoslovakia, as a subject of international law, was born without *any* territorial basis and practically without a population, but it *developed into a state without losing its identity*. The Czechoslovak Republic had its genesis in the Czechoslovak National Council that acted, during the First World War, as a representative of the Czechoslovak nation.<sup>59</sup> Under the Council, a 30,000-strong Czechoslovak army fought the Great War against the Austrian Empire and its allies on different fronts.<sup>60</sup>

These two entities were considered by the Allied Powers (*Entente*) as the legitimate representatives of the Czechoslovak people. The British Foreign Office heavily financed the recruiting operations of this army; it stated that "[s]ince the beginning of the war, the Czecho-Slovak nation has resisted the common enemy by every means in its power. . . . In consideration of its efforts to achieve independence Great Britain regards the Czecho-Slovaks as an allied nation."<sup>61</sup> From October 24, 1917 onward, Italy recognized the Council as a Czechoslovak government well before any authority on the territory of Czechoslovakia had been secured.<sup>62</sup> On April 21, 1918, Italy and the National Council signed a Convention mentioning the existence of a sole and autonomous Czechoslovak army under the authority of the National Council;<sup>63</sup> on June 30, 1918, a Convention between Italy and the National Council envisaged the direct execution of the laws passed by the latter within the Italian kingdom and stated that the Czech military was under the jurisdiction of

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57. For an analysis of this issue, see DONATO DONATI, *STATO E TERRITORIO* 33-34 (1924). The author also provides an interesting study of the theoretical qualifications of "nomadic States." *Id.* at 28-31.

58. Joseph L. Kunz, *Identity of States in International Law*, 49 *AM. J. INT'L L.* 68, 72 (1955).

59. See JOSEF KALVODA, *THE GENESIS OF CZECHOSLOVAKIA* 180-206 (1996).

60. *Id.*

61. *Diplomatic Note of Aug. 9, 1918*, in 1 *GREAT BRITAIN AND THE LAW OF NATIONS* 236 (Herbert Smith ed., 1932). Note the sheer difference with the declaration on the Polish National Committee in London of October 15, 1917, which only stated "His Majesty's Government are very willing to recognise this official Polish organisation." *Id.* at 235.

62. KALVODA, *supra* note 59, at 259.

63. See MIELE, *supra* note 32, at 54.



Czech court-martials.<sup>64</sup> A Czechoslovak government in exile was established in Paris only later<sup>65</sup> and recognized by several nations, including France, Serbia, Belgium, Greece, and Italy.<sup>66</sup>

The expressions of recognition of the National Council and of the government in exile could be construed as the expression of the *political* will to recognize an entity representing one of the nationalities within the Austro-Hungarian Empire fighting against the empire itself—that is, a politically motivated recognition to a military group as a way of persuading it to join the war effort. But when one considers these recognitions together with events unfolding after the end of the Great War, another explanation appears more likely. The peace treaties of Saint Germain-en-Laye (with Austria)<sup>67</sup> and Trianon (with Hungary)<sup>68</sup> list Czechoslovakia among the winning “Allied and Associated Powers.” To be among the victorious states, the subject called “Czechoslovakia” must have already been in existence *before* the end of the war and the dissolution of the Austro-Hungarian Empire. But there is no doubt that, at least before November 3, 1918, the date of the armistice of Villa Giusti between the Empire and Italy (the last official act of Emperor Karl),<sup>69</sup> neither the National Committee nor the “government in exile” enjoyed effective control over any portion of the territory of what would become Czechoslovakia.

The only logical explanation is that a subject of international law (an ally of the *Entente*) existed *before* the dissolution of the Empire and was able to engage in international relations with other subjects; when the war ended, that same subject was finally able to acquire a territorial basis. The late acquisition of territory by this (already existing) international subject, however, did not modify its nature and its “essence,” for it was considered the same subject which had fought as an “Allied and Associated Power.”<sup>70</sup> No other national group

64. Supplementary Convention between the Italian Government and the Czechoslovak National Council of June 30, 1918, *reprinted in* MIELE, *supra* note 32, at 106-07.

65. On these events, see Antoine Hobza, *La République Tchèque et le droit international*, 29 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 385-409 (1922).

66. TALMON, *supra* note 13, at 287.

67. Treaty of Peace between the Allied and Associated Powers and Austria, Sept. 10, 1919, Consol. T.S. 8, 4 U.K.T.S. 103, *reprinted in* 14 AM. J. INT'L L. 1 (Supp. 1920).

68. Treaty of Peace between the Allied and Associated Powers and Hungary, and Protocol and Declaration, June 4, 1920, *reprinted in* 15 AM. J. INT'L L. 1 (Supp. 1921).

69. See KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 203 (2d ed. 1968).

70. According to the High Administrative Tribunal of Czechoslovakia, and therefore on the basis of that country's domestic legal order, Czechoslovakia was in

or liberation committee was recognized among the "Allied and Associated Powers" in the same treaties. In this case, a subject of international law, *par inter pares*, existed before it was able to exercise effective authority over any territory; when it did acquire this ability, it continued to exist according to its new situation without any essential modification of its personality and identity.

The last three cases suggest that entities without a stable territory or population (or both) are not necessarily different from states. In fact, all these subjects retained their own identity as subjects of international law, with the rights and duties flowing from this position, both in times when they enjoyed effective control over a territory and in times when they were forced by circumstances to survive on some other state's territory—as if in a sort of "artificial lung" that kept them alive (Holy See, Sovereign Order of Malta)<sup>71</sup> or even assisted them at their birth (Czechoslovakia). In cases of what at the time was regarded as occupation of *terra nullius* (Boers), the transfer of the organized population to an altogether new territory did not alter the personality of the subject.

#### 4. Spain and Turkey

In addition to the above-mentioned cases, in which subjects of international law regarded as equal to states (or, in certain cases, regarded as states proper) do not possess all the attributes set out in the classical definition of the *Restatement*, there are cases of subjects—insurgents or belligerents<sup>72</sup>—developing into states or being attributed rights and duties typical of states.

There are different views on the legal evaluation of the events surrounding the Spanish Civil War, dating from July 17, 1936 to March 28, 1939.<sup>73</sup> According to the standard account, the lawfully elected Republican government was replaced by the Nationalist one at least by March 28, 1939, when troops led by General Franco

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existence since October 28, 1918, the date of the proclamation of independence by the National Committee, and therefore before the dissolution of the Empire (November 1918) and the peace treaties recognizing its sovereignty (signed in 1919 and 1920). See Establishment of Czechoslovak State, 3 I.L.R. 13, 14 (Sup. Admin. Ct. of Czech Rep. 1925). This judgment does not exclude the possibility that the subject of international law existed even before October 28, 1918, although without the forms typical of a state.

71. For this image, see Arangio-Ruiz, *On the Nature of the International Personality of the Holy See*, *supra* note 30, at 365.

72. See Eibe Riedel, *Recognition of Belligerency and Recognition of Insurgency*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 167-73 (Rudolf Bernhardt ed., 1997) (providing definitions of insurgency and belligerency); see also BROWNLIE, *supra* note 1, at 63 (noting that insurgents and belligerents are both considered subjects entitled to enter into legal relations on the international plane); SHAW, *supra* note 9, at 219-20, 1040-41 (observing that the concepts of insurgency and belligerency are not easily distinguishable).

73. See generally James W. Garner, *Questions of International Law in the Spanish Civil War*, 31 AM. J. INT'L L. 66 (1937).

entered Madrid. At that point (although the exact time is subject to debate), Nationalist insurgents somehow became an organ of the Spanish state, which did not cease to exist. The Republican government, representing "Spain" until March 27, is said to have disappeared, leaving the territory and population (of Spain) under the rule of Franco. How exactly an *entity* (the insurgent community under Franco) had become *an organ of another entity* (Spain, the state it was fighting until March 27) is a mystery. How the Republican government of Spain, being an essential element of the state of Spain according to the definition of "state" provided for in the *Restatement*, could disappear but, at the same time, "leave in inheritance" the "state of Spain" to the next government is an even greater mystery.

If, however, we focus our attention on effective authorities—governments—rather than on "states," the matter can be interpreted in an altogether different light. As time passed and the Nationalist government gained ground through force (aided by Italian and German interventions), its sphere of effective jurisdiction expanded with every victory in the field; conversely, the Republican government (Spain) saw its authority diminished as far as control over territory was concerned. These entities were not qualitatively different one from the other. For this reason, the international community saw them as belligerents, qualitatively on the same level, and consequently applied the rules of warfare and neutrality.<sup>74</sup>

Both governments ruled their respective territory with effective authority and engaged in international intercourse. Many of the diplomats of "Spain" before 1936 joined the Franco regime and became "ministers" or *chargés d'affaires* to other countries.<sup>75</sup> An example of this is provided by the disputes regarding the gold of the Spanish National Bank. In 1931, the Spanish National Bank had deposited a large amount of gold with the French National Bank. This gold was requested, after the beginning of the civil war, both by the Nationalist and by the Republican governments, each of which had, by that time, its own "Spanish National Bank."

Each government deemed itself entitled to the whole sum as the representative of "Spain." The problem was that, according to French or international law, there was no rule to decide which entity was

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74. See also ROBERT HODGSON, *SPAIN RESURGENT* 74-99 (1953). Hodgson's analysis of the policy of non-intervention in the Spanish Civil War, especially by Great Britain, albeit appallingly biased in favor of the Franco regime, provides a large amount of useful information on the general attitude of diplomatic circles toward the two belligerents.

75. See MARINA CASANOVA, *LA DIPLOMACIA ESPAÑOLA DURANTE LA GUERRA CIVIL* 241-53 (1996) (providing a list of diplomats who joined the Franco regime). Casanova's book is extremely interesting especially with respect to the "parallel" diplomacy that ensued after the beginning of the Civil War and the necessity of the Republic to acquire weapons in the battle for its own survival. See *id.* at 27-35, 161-93.

“Spain”; the French judiciary therefore refused to take a stand on the issue.<sup>76</sup> The decision was finally taken by the French government, on a purely political level, to recognize the Franco regime on February 27, 1939.<sup>77</sup> Similarly, in June 1938, the British Government expressed its view that

His Majesty's Government recognizes the Nationalist Government as a Government which at present exercises de facto administrative control over the larger portion of Spain [and] effective administrative control over all the Basque Provinces of Spain. . . . [T]he Nationalist Government is not a Government subordinate to any other Government in Spain.<sup>78</sup>

Courts generally abided by this view, stating that there were two sovereigns in Spain, albeit one de facto (Nationalist) and one de jure (Republican); no substantial difference seemed to exist on the legal level between the two characterizations. In an action before a Norwegian court by a chargé d'affaires of the Nationalist government to hold and dispose of the property of the former ambassador to Norway, the plaintiff claimed that the Court should have decided “for itself whether or not the necessary conditions have been fulfilled in order that that Government must be recognized as exercising a lawful authority over Spain or a part thereof.”<sup>79</sup> The District Court, however, referred to the executive branch of Norway and declared that “[a]s long as there exists a Spanish State and Government recognized by the Norwegian authorities, the right to possess and dispose of effects of such State . . . belongs to the representative of such State.” The Supreme Court followed this reasoning.<sup>80</sup> Although

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76. See Georges Scelle, *La guerre civile espagnole et le droit de gens – L'or de la banque d'Espagne*, 45 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 649 (1938).

77. MIELE, *supra* note 32, at 20-21.

78. *In re Arantzazu Mendi*, [1939] A.C. 256 (H.L. 1939) reprinted in 9 I.L.R. 60, 61-62. The House of Lords unanimously interpreted these statements as implying that the Nationalist government, “for the purposes of international law,” was “a foreign sovereign State.” The extension of the two states' territories, and their modifications, was regarded as immaterial. See *id.* at 66. In addition, the English Court of Appeals held in *Banco de Bilbao v. Sancha and Rey*, 9 I.L.R. 75, 77 (1987), that the decrees of the de jure government had no effect in the territory of the de facto one in. More recently, this approach was followed by the Queen's Bench Division (Commercial Court) in *Sierra Leone Telecommunications Co. Ltd. v. Barclays Bank*, [1998] 2 All E.R. 821, 822 (Q.B. 1998), in which the Court sided with the U.K. government and refused to recognize the military junta in control of Freetown, the capital of Sierra Leone, as the “Government of Sierra Leone.” Interestingly, the Special Court for Sierra Leone—set up jointly by the U.N. and the Sierra Leone Government for crimes committed during the civil war in that country after November 30, 1996—rested on that very ruling to find that it had jurisdiction in *Prosecutor v. Callon*, No. SCSL-2004-14-AR72E, ¶¶ 72-79 (decision on constitutionality and lack of jurisdiction of March 13, 2004), available at <http://www.sc-sl.org> (last visited Nov. 2004).

79. See *Campuzano v. Spanish Government*, 11 I.L.R. 68, 69 (Sup. Ct. of Norway 1938).

80. *Id.* at 71.

this conclusion seems at odds with the previously cited French one, it is actually based on the same logic—i.e., that the executive is allowed to make decisions in this area of international relations because there is no strict legal provision a tribunal can apply to decide which government represents a certain state during a civil war—unless one of the two governments intends not to gain ultimate control over the whole territory, but merely to secede.<sup>81</sup> German courts predictably took the opposite view—that the Nationalist government was the de jure one, while the Republic should be regarded as an insurgent, exercising de facto authority on Catalonia and other regions.<sup>82</sup>

Recognition, too, could not solve the issue decisively. The different examples of competing recognitions by a different group of states only show that recognition is merely a political choice, with no effective bearing on the qualification of an entity as a subject of international law. In fact, the Republican government-in-exile was recognized as the only legitimate Spanish government by Yugoslavia and Mexico until March 1977, when democracy was restored to the country.<sup>83</sup>

A case analogous to Spain, contrary to the opinion of most scholars, is that of the Ottoman Empire and the Turkish Republic after the First World War, which involved two subjects of international law confronting each other. These were the Ottoman Empire, which had declared and lost the war alongside Germany and the Austro-Hungarian Empire, and the Kemalist Republic, which was born out of a group of nationalist insurgents to become present-day Turkey.<sup>84</sup>

Domestic decisions related to recognition of other governments are not able to deny international status to the new entity seeking power and recognition. They merely intend to reaffirm that one subject of international law wishes to keep conducting business as usual with the other subject—be it the Republican Government of Spain, the Ottoman Empire, or the Government of Sierra Leone. Some countries leave this appreciation entirely in the hands of the executive branch of the government, while others allow courts to make this determination.<sup>85</sup>

81. See discussion *infra* Part II.C.5.

82. See *In re Spanish Republican Government (Security for Costs)*, 9 I.L.R. 73 (Ct. App. of Germany 1938).

83. See TALMON, *supra* note 13, at 298.

84. See Enrico Zamuner, *Le Rapport entre Empire ottoman et République turque face au droit international*, 6 J. HIST. INT'L L. 209 (2004) (detailing the underlying history of the relevant events and providing a demonstration in law of the existence of two different subjects in that instance).

85. BROWNLIE, *supra* note 1, at 95-96.

## 5. The Confederate States of America

Similar to the examples above is the case of insurgents or belligerents *not* succeeding in their efforts, as long as their control over (a portion of) the territory is effective and they are able to engage in affairs both inside and outside their borders. The Confederacy created by those states seceding from the United States of America in 1861 is a prime example. In that case, seven seceding states created a Constitution to form a new subject. The secession and all following acts were based on the premise that the states composing the Union were “Free and Independent States [with] full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”<sup>86</sup> The position of the Confederates was that the U.S. Constitution always speaks of states, though united through a compact, as separate entities.<sup>87</sup>

During the years of war, the Confederate States of America (CSA) strove to reach the political objective of official recognition by other countries—notably France, Great Britain, and Mexico.<sup>88</sup> The fact that the CSA never succeeded in reaching this aim did not preclude it<sup>89</sup> from engaging in international interaction.<sup>90</sup> The only

86. THE DECLARATION OF INDEPENDENCE (U.S. 1776), *available at* <http://www.ushistory.org/declaration/document>. For a discussion of this topic from a Confederate perspective, see JEFFERSON DAVIS, *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* 70-73, 126-30 (1881).

87. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 8 (“no Person holding any Office of Profit or Trust under *them*”) (emphasis added); U.S. CONST. art. III, § 2 (“[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under *their* authority”) (emphasis added); U.S. CONST. art. III, § 3, cl. 1 (“[t]reason against the United States, shall consist only in levying War against *them*”) (emphasis added). It is noted in U.S. Supreme Court decisions that there is no consistency concerning whether the United States of America should be addressed in the singular or in the plural. *Compare* *Heckers v. Fowlers*, 69 U.S. 123, 128 (1864) (“[w]here the United States are plaintiffs”), and *In re Henderson’s Distilled Spirits*, 81 U.S. 44, 58 (1871) (“the United States are entitled to judgement”), and *Dow v. Johnson*, 100 U.S. 158, 175 (1879) (“the United States are plaintiffs or petitioners”), with *Davidson Bros. Marble Co. v. United States*, 213 U.S. 10, 17 (1909) (“a suit in which the United States is plaintiff”), and *United States v. Shaw*, 60 S. Ct. 659, 663 (1940) (“when the United States is plaintiff”). Common English language has accepted that the United States “is,” although other languages have chosen a different path. Among others, German, French, Italian, Greek all refer to the “Unites States of America” with plural verbal forms.

88. *See generally* FRANK LAWRENCE OWSELY, *KING COTTON DIPLOMACY – FOREIGN RELATIONS OF THE CONFEDERATE STATES OF AMERICA* 318-577 (1931).

89. Although the confederated states saw themselves as a plurality of sovereign subjects, I am using the singular form to address them because, *in its international relations*, the Confederacy was clearly deemed by its own participants as *one* entity.

90. A compelling case in this respect is made by the historical analysis in FREDERIK GRAHAM WINN, *A STUDY OF THE DIPLOMATIC RELATIONS BETWEEN FRANCE AND THE CONFEDERATE STATES OF AMERICA* 6-9, 30-33, 95-98 (1958).

reason recognition was not granted was fear of U.S. reprisal.<sup>91</sup> If the view is accepted that recognition is not constitutive of international subjects, the lack of recognition does not as such have any bearing on the conclusion reached with respect to the international personality of the CSA. In this respect, U.S. Secretary of State Seward instructed the U.S. ambassador to London that should Great Britain recognize the Confederacy, he was to communicate to the British government "promptly and without reserve that all negotiations for treaties of whatever kind between the two governments will be discontinued."<sup>92</sup> According to this statement, the United States was not going to act through a countermeasure, which would have been allowed under international law had the act of recognition of the CSA been considered a breach of international law, but through a mere act of retortion, aimed at adversely affecting British interests but not British rights under international law.<sup>93</sup> Thus, even the United States did not consider recognition of the CSA illegal under international law, but just an act of overt unfriendliness toward it.

The most important countries of the time declared themselves neutral in the war, thus accepting that both belligerents were on an equal footing and had the same rights and duties regarding the laws of warfare.<sup>94</sup> The declaration of neutrality by Great Britain<sup>95</sup> is especially important, since it gave rise to a series of legal disputes between Great Britain and the United States; most of these disputes (the so-called *Alabama* claims) were later to be solved by a joint Tribunal of Arbitration.<sup>96</sup>

The United States wished to portray the Confederates as rebels and the war as a mere domestic disturbance. According to this line of reasoning, the U.S. government never officially declared war, never

91. See 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 103-05 (1906) (reprinting the Circulars of Mr. Black (Feb. 28, 1861) and Mr. Seward (Mar. 9, 1861), U.S. Secretaries of State, addressed to U.S. diplomatic envoys abroad). The circulars state that recognition of the Confederacy would amount to disturbance of the "friendly relations, diplomatic and commercial, now existing between those powers and the United States." *Id.* No mention of breaches of international obligation is made.

92. *Id.* at 106.

93. See Peter Malanczuk, *Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 197, 207 (Marina Spinedi & Bruno Simma eds., 1987) (writing that "retortion is an unfriendly act against another State with the object to persuade that State to end its harmful conduct").

94. See 10 VERZIJL, *supra* note 28, at 115.

95. See ARNOLD DUNCAN MCNAIR, INTERNATIONAL LAW OPINIONS 146-47 (1956).

96. For the history of the arbitration, see JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 496-97 (1898); 10 VERZIJL, *supra* note 28, at 118.

recognized the Confederacy as a sovereign state, and deemed the soldiers fighting under Confederate colors traitors or pirates when assaulting U.S. vessels. This position, however, belied the facts. President Lincoln ordered measures in the manner of a blockade<sup>97</sup> to counter the CSA's bid for survival. U.S. courts tried Confederate soldiers accused of treason or piracy but often failed to enter convictions.<sup>98</sup> The U.S. Supreme Court recognized that in determining whether the United States could condemn the property of rebels, the right to condemn enemy property during war was an accepted practice *under international law*.<sup>99</sup> The U.S. Supreme Court also acknowledged that promissory notes in Confederate money were enforceable in U.S. courts after the war<sup>100</sup> and that investments in Confederate bonds were lawful.<sup>101</sup>

The Confederacy was a subject of international law with all the rights and duties pertaining to a state.<sup>102</sup> Although it was not officially recognized as a state, it acted as the paramount authority over the territories it held, and the population thereon; it engaged in international interaction with other subjects; it was considered a lawful belligerent party. "The insurgent community therefore possessed a government established as formally as is possible in a society the separate political existence of which is not acknowledged."<sup>103</sup> Judge Grier, writing for the majority in the *Prize Cases* remarked that "[this] is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force—south of

97. See the discussion on the meaning of this formulation in the judgment and dissenting opinion of *The Prize Cases*, 67 U.S. 635, 665-71, 682-85 (1862).

98. See Susan Poser & Elizabeth Varon, *United States v. Steinmetz: The Legal Legacy of the Civil War, Revisited*, 46 ALA. L. REV. 725, 744-50 (1995).

99. *Miller v. United States*, 78 U.S. 268, 306-07 (1870). No need to refer to international law would have existed had the Supreme Court considered the matter a mere question of U.S. domestic law.

100. *Thorington v. Smith*, 75 U.S. 1 (1868), *cited in* *Aboitiz & Co. v. Prince*, 99 F. Supp. 602 (D.C. Utah 1951) (applying this principle to an armed conflict of international character).

101. *Baldy v. Hunter*, 171 U.S. 388, 400 (1898).

102. See also *Mauran v. Alliance Ins. Co.*, 73 U.S. 1, 14 (1867). Justice Nelson wrote that "the so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as the ruling or supreme power of the country. . . ." *Id.* (emphasis added). In fact,

[w]hen [a rebellion] has become a recognised war those who are engaged in it are to be regarded as enemies. And they are not the less such because they are also rebels. They are equally well designated as rebels or enemies. Regarded as *descriptio personarum*, the words "rebels" and "enemies," in such a state of things, are synonymous.

*Miller*, 78 U.S. at 309.

103. WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 44 (1924).



this line is enemy's territory, because it is held in possession by an organized, hostile and belligerent power."<sup>104</sup>

This is not to say that the secession by the Confederate states was legal under the U.S. legal system<sup>105</sup> or under international law at the time, nor that it might be considered lawful under current understandings of the self-determination principles enshrined in the U.N. Charter and supporting documents. In particular, the position of the U.S. government and Supreme Court—that, according to the U.S. Constitution, the seceding states had never actually seceded—has no direct relation to the question of the international personality of the Confederacy.<sup>106</sup> The issue of the existence of a separate international subject has no direct relation with the legality of its conduct under domestic or international law; on the contrary, the analysis of its possibly unlawful acts presupposes its existence as a distinct entity. If the Confederacy had not been a subject of international law, no possible discourse on violations of international law by that entity would be conceivable.

As stated in the preceding pages, the creation and death of states in the sense of international law is a question of fact—and, de facto, the CSA acted as the governing body over a defined territory for over four years, just as the original thirteen colonies had done, more successfully, after they effectively rejected the lawfully constituted government of the British Crown.<sup>107</sup>

104. See *The Prize Cases*, 67 U.S. 635, 673-74 (1862).

105. The situation, according to U.S. domestic law, was in fact no different from the one of the thirteen colonies in their struggle against British rule under (British) constitutional law or, for that matter, of the seceding states of Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia according to the constitutional law of the former Yugoslavia. In particular, see the arguments suggesting the illegality of the secession of the Yugoslav republics in the early 1990s, according to Yugoslav constitutional law, by ROBERT M. HAYDEN, *BLUEPRINTS FOR A HOUSE DIVIDED – THE CONSTITUTIONAL LOGIC OF THE YUGOSLAV CONFLICTS* 30-52 (2002).

106. See *Keith v. Clark*, 97 U.S. 454, 461 (1878) (stating that “the State [of Tennessee] remained a State of the Union. She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement.”)

107. EDWARD S. MORGAN, *THE BIRTH OF THE REPUBLIC 1763-1789* 58-64 (1956). King George III, in his speech before the British Parliament on October 26, 1775, found that “[rebels in America] have raised Troops, and are collecting a Naval Force; they have seized the public Revenue, and assumed to themselves Legislative, Executive, and Judicial Powers, which they already exercise in the most arbitrary Manner over the Persons and Properties of their Fellow Subjects.” See Merrill Jensen, *American Colonial Documents to 1776*, in 9 *ENGLISH HISTORICAL DOCUMENTS* 851 (David C. Douglas ed., 1955). This declaration is a recognition of a state of fact existing in the thirteen colonies, against which the British government had to take extraordinary steps; the situation had reached the stage of an insurgency. The fact that the thirteen colonies had become de facto independent at least during 1775 or 1776 was later confirmed by the U.S. Supreme Court in *Ware v. Hylton*, in which the Court stated:

Evidence of the state-like status of the Confederacy is also provided by recent U.S. judicial rulings that considered it a predecessor of the United States.<sup>108</sup> In the *Steinmetz* case, the United States accepted that rights and duties flowed from the CSA as they would have from a conquered state and espoused the view that the United States is a successor state in respect of the Confederacy; therefore, the CSA must have been a subject of international law entitled to wage war, to own military property, and to be a predecessor with respect to public property.

## 6. China and Taiwan

The case of Taiwan, also known as the Republic of China (ROC), demonstrates the uncertainties of the *Restatement's* definition of "state"; the Comment appended to paragraph 201 and the Reporters' Notes indeed make reference to Taiwan and its status under international law.<sup>109</sup> A brief historical analysis of the events leading to the present situation may help shed some light on the actual situation.

In 1683, the Ch'ing dynasty ruling mainland China annexed the island to its empire, incorporating it into the province of Fukien.<sup>110</sup> In 1886 the island of Formosa (Taiwan) formally became a province of

This abolition of the Old Government, and this establishment of a new one was the highest act of power, that any people can exercise. From the moment the people of Virginia exercised this power, all dependence on, and connection with Great Britain absolutely and forever ceased; and no formal declaration of Independence was necessary. . . .

3 U.S. 199, 223 (1797).

108. *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). In fact, a program of military naval building was envisaged by the Confederacy among the actions taken to wage the war. Since the blockade declared and effectively put in place by the U.S. prevented the CSA from building its own warships in local ports, the Confederate government took steps to have the ships built in European ports as commercial vessels and then to outfit them on the high seas. One such ship, the *Alabama*, was sunk in 1864 by the U.S. Navy; its bell was recovered some seventy years later and ended up in the shop of an antiques' dealer, Mr. Steinmetz. The U.S. government successfully claimed title on the premise that the U.S. is the successor of the CSA under international law by relying on *United States v. Huckabee*, in which the Supreme Court stated:

[I]f the nation is entirely subdued, or in case it be destroyed and ceases to exist . . . [the rights of the conqueror] are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the *conquered state*. . . .

83 U.S. 414, 434-45 (1873) (emphasis added).

109. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201, cmt. F, reporters' n.8 (1987).

110. Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 AM. J. INT'L L. 453, 454-56 (2000).

China.<sup>111</sup> After Japan defeated China in 1895, Taiwan was ceded to Japan "in perpetuity" under the Treaty of Shimonoseki<sup>112</sup> and remained under Japanese sovereignty until the Second World War.

The Chinese imperial government was overthrown in 1911; the new (republican) government was recognized by the United States, Japan, Russia, Great Britain, and other states in the following years.<sup>113</sup> But its legitimacy in parts of the territory purportedly under its authority was challenged by a number of local warlords well into the 1920s.<sup>114</sup>

During the Second World War, both the Cairo Declaration of 1943<sup>115</sup> and the Potsdam Declaration of 1945<sup>116</sup> stated that Chinese sovereignty should be restored over all the territories taken by Japan, including Taiwan. The Chinese government, a founding member of the United Nations, was therefore recognized as the same international subject that had relinquished its authority over Taiwan in 1895.

With Japan's surrender in 1945,<sup>117</sup> the Supreme Allied Command invited Chinese armed forces to Taiwan with the aim of enabling the Chinese government to regain possession of the island. Chinese administration attempted to assume control on October 3, 1945 as a military government under an Administrator-General and Concurrently Supreme Commander for Taiwan Province. Between September 2, 1945<sup>118</sup> and October 3, 1945, the island was neither governed by Japan nor effectively controlled by China.<sup>119</sup> After

111. SIMONG LONG, *TAIWAN: CHINA'S LAST FRONTIER* 1-23 (1991).

112. Treaty of Peace, Apr. 17, 1895, China-Japan, 181 Consol. T. S. 217.

113. See JEROME ALAN COHEN & HUNG DAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 207 (1974).

114. See generally Tarcisio Gazzini, *Some International Legal Aspects of the Chinese Civil War (1927-1949)*, 1 J. ARMED CONFLICT L. 141 (1996) (providing a brief and clear account of the Chinese Civil War and its consequences on the identity of the ROC).

115. Final Text of the Communiqué, Dec. 1, 1943, 3 Bevens 858, 1943 FOREIGN RELATIONS OF THE UNITED STATES, THE CONFERENCES AT CAIRO AND TEHRAN 448.

116. Proclamation by the Heads of Governments, United States, China and United Kingdom, July 26, ¶ 8, 3 Bevens 1204, 1945 FOREIGN RELATIONS OF THE UNITED STATES, 2 THE CONFERENCE OF BERLIN (THE POTSDAM CONFERENCE) 1474.

117. Surrender by Japan, Terms Between the United States of America and the Other Allied Powers and Japan, Sept. 2, 1945, 59 Stat. 1733, E. A. S. No. 493.

118. September 2, 1945 was the date of the unconditional surrender of Japan to the Allied forces. The Act of surrender contained the obligation "for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith." *Id.* This instrument shows that the Potsdam Declaration provisions regarding Japan were considered legally binding on the parties to the Act of Surrender (including, among others, the United States, China, and Japan).

119. The Act of Surrender of Japanese Forces in China reads:

October 3, 1945, some authority on the island was vested in the Chinese government under the Guomindang party, although it is by no means clear whether this government was sovereign or, rather, was acting under the mandate of the Allied Supreme Command.<sup>120</sup>

The matter is complicated by the fact that, at least by 1949, two different governments openly struggled to be recognized as the Chinese government.<sup>121</sup> This fact, together with the political clout created by the confrontation between the communist and the capitalist "fields" since the late 1940s, has puzzled international scholars, with a few exceptions,<sup>122</sup> up to the present day.

The debate on this issue has generally concerned the right (or duty) to recognize each of the two governments, as well as the diplomatic, political, and economic relations between members of the international community and each of the two subjects.<sup>123</sup> The debate is also tainted by strong political considerations, and it does not provide a clear legal answer on the identity of either subject.<sup>124</sup>

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The Emperor of Japan, the Japanese government and the Japanese Imperial General Headquarters, having recognized the complete military defeat of the Japanese military forces by the Allied forces and having surrendered unconditionally to the Supreme Commander for the Allied powers, having directed by his general order no.1 that the senior commanders and all ground, sea, air and auxiliary forces within China *excluding Manchuria, Formosa and French Indo-China* north of 16 degrees north latitude shall surrender to Generalissimo Chiang Kai-shek. . . .

Act of Surrender of Japanese Forces in China, Sept. 9, 1945, available at <http://www.taiwandocuments.org/japansurrender.htm> (last visited Nov. 2004).

120. General Chiang Kai-shek recognized that he was to accept the surrender of all Japanese forces within China (excluding Manchuria), Formosa, and French Indo-China north of 16 degrees north latitude in compliance with the General Order issued by the President of the United States *on behalf of the Allied Powers to General MacArthur*, and not of his own authority. See WOODBURN KIRBY, *THE WAR AGAINST JAPAN* 283 (1969). Later, the Treaty of Peace between the Republic of China and Japan provided that "[i]t is recognised that under [the multilateral Peace treaty of 1951] Japan has renounced all rights, title and claim to Taiwan (Formosa)." Treaty of Peace between the Republic of China and Japan, Apr. 28, 1952, 138 U.N.T.S. 3, 38. The fact that a treaty recognizes the loss of sovereignty of one state over a portion of its territory does not indicate that this succession actually took place on the date of the entering into force of the treaty itself, however. Succession is "the replacement of one State by another in the authority over a territory." See Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Apr. 7, 1978, 22 I.L.M. 306, 308 (1983). Therefore, *effective* substitution of authority must occur before succession actually takes place.

121. The PRC was established in 1949, but Guomindang forces have had effective control over Taiwan since at least 1947, when they put down a rebellion by the indigenous Taiwanese people. See Parris Chang & Kok-ui Lim, *Taiwan's Case for United Nations Membership*, 1 UCLA J. INT'L L. & FOREIGN AFF. 393, 413 (1996).

122. See Gazzini, *supra* note 114. The following legal explanation of the civil war between Mao Zedong and Chiang Kai-shek relies on Gazzini's analysis.

123. See, e.g., Lori Fisler Damrosch, *The Taiwan Relations Act After Ten Years*, 3 J. CHINESE L. 157 (1989).

124. One example of this is provided by discussions in U.S. legal and diplomatic circles on the recognition of Communist China during the 1950s and 1960s. See

The civil war between the Communist forces under the leadership of Mao Zedong and the Nationalist forces under Chiang Kai-shek started in 1927.<sup>125</sup> At least from 1931, two different subjects of international law existed on the territory of today's "mainland China." One was the Chinese government (usually called "Nationalist," or Guomindang from the name of its ruling party at the time), which exercised effective authority over a large, though slowly shrinking, portion of mainland China. The other was the Communist entity, increasingly asserting its authority over portions conquered from the Nationalist government.<sup>126</sup> In 1949, the Nationalist government escaped to Taiwan, and hostilities between the two subjects effectively came to an end. That event did not affect in any way the identity of the two contenders.

As far as the Communist People's Republic of China (PRC) as a subject of international law is concerned, different theses have been proposed. The most widely accepted seems to be that the movement led by Mao Zedong, a mere insurgent before 1949, became a successor government to China and then changed the nation's name to the PRC. After some years of uncertainty, so the argument goes, the United Nations acknowledged the situation by accepting the PRC as the sole Chinese representative in the organization, and practically all of the states that had previously rejected this position gradually accepted it. Thus, the argument links membership in international organizations, and in particular the permanent seat in the U.N. Security Council, not only to the issue of statehood in general, but also to the identity of the PRC and ROC as subjects of international law.

The incongruities deriving from this formulation are significant. First, as it was pointed out above, it is not clear how an insurgent—which is a *subject* itself—may turn into a *mere organ* of another subject. Second, the Republic of China did not disappear after Mao Zedong took power in mainland China. It is difficult to conceive how an insurgent becomes an organ of the very state against which it has fought and which the insurgent has forced to migrate to a different territory.

Third, and more important, the PRC and the ROC govern separate territories, do not recognize any other subject as superior,

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generally ROBERT P. NEWMAN, RECOGNITION OF COMMUNIST CHINA? 104-241 (1961) (exploring a variety of political issues underlying the choices in favor and against recognition). See also Lung-chu Chen & W.M. Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599 (1972); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 879 (1999); Guiguo Wang & Priscilla M.F. Leung, *One Country, Two Systems: Theory Into Practice*, 7 PAC. RIM L. & POL'Y J. 279 (1998).

125. See Gazzini, *supra* note 114, at 141-49 (recounting the different phases of the war).

126. *Id.*

and effectively engage in the activities of the subjects of international law. In fact, the only reasonable explanation of the kind of relationship they have with each other is that the PRC and the ROC are two different subjects. At least since 1979, the Taipei government stated that the ROC “is an independent sovereign state with a legitimate established government.”<sup>127</sup> On July 10, 1999, the Taiwanese President noted that contacts between Taiwan and the PRC would be treated as “state-to-state relations.”<sup>128</sup>

Starting from the assumption discussed above that recognition has no constitutive effect, the fact that the vast majority of the countries of the world do not recognize Taiwan does not, in itself, constitute a ground to deny the existence of the ROC as an independent state.<sup>129</sup> Recognition by most states that the PRC is, today, “China” in international relations cannot be deemed decisive.<sup>130</sup> The same can be said about the relationship between the United Nations and China. Since 1971, when the PRC replaced the ROC as the legitimate Chinese government holding the permanent seat in the Security Council,<sup>131</sup> the idea that the ROC is not a state any longer—and, in any event, is not China—has gained support.<sup>132</sup> But the United Nations—as a sovereign intergovernmental organization—is allowed to decide which governments to admit as

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127. *Id.* at 150.

128. See 1 SEAN D. MURPHY, *UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1999-2001 134 (2002). It has been argued that the main reason why Taiwan is not a state under international law is that it does not claim to be one. See JAMES CRAWFORD, *THE CREATION OF STATES* 151 (1979). Therefore, the ROC should arguably be considered a state after these proclamations. See also Alan M. Wachman, *The State-to-State Flap: Tentative Conclusions about Risk and Restraint in Diplomacy Across the Taiwan Straits*, 4 HARV. ASIA Q. (2000), available at <http://www.fas.harvard.edu/~asiactr/haq/200001/0001a008.htm>.

129. The reasoning underlying most analyses, though, is based precisely on this assumption. See, e.g., Michael D. Swaine, *Trouble in Taiwan*, FOREIGN AFF. 39, 46-47 (Mar.-Apr. 2004). Swaine claims that “recognition of a people’s status as a nation-state is conferred by the international community and is highly subject to the calculations and interests of the most influential powers involved” and concludes that “[b]y this standard, Taiwan is not currently an independent nation.” *Id.* at 47. The real issue is, of course, whether this is the appropriate standard.

130. See Markus G. Puder, *The Grass Will Not Be Trampled Because the Tigers Need Not Fight—New Thoughts and Old Paradigms for Detente Across the Taiwan Strait*, 34 VAND. J. TRANSNAT’L L. 481, 520-22 (2001) (providing the number of states holding various different positions in respect to the PRC and the ROC).

131. As is well-known, G.A. Res. 2758 (XXVI) of October 25, 1971 did not treat the admission of the delegates of the PRC as a membership issue, but rather as a question of the right to represent the founding member, China. See SIMMA, *supra* note 12, at 157; see also Samuel S. Kim, *The People’s Republic of China in the United Nations: A Preliminary Analysis*, 26 WORLD POL. 299 (1974) (addressing the events surrounding this fundamental switch in U.N. members’ policy).

132. See, e.g., Anthony D’Amato, *Purposeful Ambiguity as International Legal Strategy: The Two China Problem*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 109-11 (Jerzy Makarczyk ed., 1996).

members and which governments to refuse. If the admission by the U.N. of Byelorussia and the Ukraine did not elevate those republics to the level of subjects of international law,<sup>133</sup> the refusal after 1971 to accept the ROC as a U.N. member does not necessarily have any effect on the personality of the entity involved.

The alternative approach, which reconciles the factual reality of the situation with the relevant legal principles, is to acknowledge that notwithstanding the lack of recognition by a significant number of the international community's members, it cannot be maintained that the PRC was not a state before its accession to the United Nations. Had the PRC attacked another country in the 1950s, this would have been regarded as a war of international character. U.N. Security Council Resolutions 82 to 85 dealing with the Korean War do not mention Chinese intervention in the conflict.<sup>134</sup> But the Security Council, with Resolution 88, did invite a representative of the PRC to discuss the terms for a cease-fire in 1950.<sup>135</sup> During the same period, moreover, the Security Council, as reflected in Resolution 87, considered that the dispute between the two Chinese entities—namely the armed invasion of the island of Taiwan—was likely to lead to international friction or to give rise to an international dispute.<sup>136</sup> In this case, the Security Council was concerned about a possible war between two states exercising their effective authority over different, well-defined territories. PRC and Taiwan were thus regarded as distinct—and formally equal—subjects of international law. Since neither has ceased to exist to this date, they both continue to be distinct subjects of international law.

U.S. courts have also recognized the fact that, regardless of political considerations, the ROC is a subject, the same subject with which the United States had entered into bilateral relations before the recognition of the PRC. For example, in *New York Chinese TV*, the U.S. Court of Appeals for the Second Circuit affirmed a finding that Taiwan was still a party to a copyright treaty with the United States signed in 1946.<sup>137</sup> If the treaty is still in force, and no issue of state succession is raised, then Taiwan still exists as the same subject

133. See *supra* note 12 and accompanying text.

134. Sec. Res. 82, U.N. SCOR, 5th Sess., 473d mtg. at 4, U.N. Doc. S/1501 (1950); Sec. Res. 83, U.N. SCOR, 5th Sess., 473d mtg. at 5, U.N. Doc. S/1511 (1950); Sec. Res. 84, U.N. SCOR, 5th Sess., 473d mtg. at 5, U.N. Doc. S/1588 (1950); Sec. Res. 85, U.N. SCOR, 5th Sess., 473d mtg. at 6, U.N. Doc. S/1657 (1950).

135. Sec. Res. 88, U.N. SCOR, 5th Sess., 520th mtg. at 7, U.N. Doc. S/1892 (1950).

136. Sec. Res. 87, U.N. SCOR, 5th Sess., 506th mtg. at 7, U.N. Doc. S/1836 (1950).

137. *New York Chinese TV Programs Inc. v. U.E. Enter.*, 954 F.2d 847, 854 (2d Cir. 1992).

of international law. Other similar judicial decisions, by U.S. and non-U.S. courts, point to the same conclusion.<sup>138</sup>

The last cases confirm the view that some entities that are not regarded as states under traditional international doctrine for various reasons actually do enjoy the status of a subject within the international realm and do possess all attributes normally sufficient to qualify as states. They are considered subjects *distinct* from the officially recognized government against which they are fighting; they can be predecessors in matters of state succession; they are entitled to enter into treaty relations with states on an equal footing. If they succeed in replacing the old government, they are considered representatives of the territory previously ruled by that one; if they do not succeed, but perish, they are considered to be just like any other conquered state. As long as these "competing" subjects coexist, political considerations may lead certain subjects to *treat* them differently from other states, but this does not signify that they are *essentially* of a different nature.

In truth, considering personalities of entities involved in armed conflicts—whether international or non-international—is a delicate matter because a stable factual situation usually results only at the end of the hostilities. The examples of Czechoslovakia (which was regarded as a state after the end of the Great War, but as the same subject as the belligerent during the hostilities), the CSA (which was deemed a predecessor of the United States under international law, just like any other "conquered state"), and China and Taiwan (which have been distinct subjects of international law from the Chinese Civil War to this day), however, all show that issues of identity and the applicability of international law are not necessarily peculiar in times of armed conflict.

## 7. Napoleon

Napoleon was exiled to the island of Elba in 1814. An interpretation of the events surrounding his exile might be that Napoleon, as Emperor, was simply replaced as the head of the French state by King Louis XVIII; a simple substitution of governments took place, and France remained substantially the same subject.

But the evidence points to a different conclusion. After Napoleon's defeat, two different governments existed in France: one under Napoleon, which controlled no territory, and one under Louis XVIII. This is shown by the fact that, at the end of the war, two treaties were signed. One of the treaties was signed, on the one side,

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138. See, e.g., *Bank of China v. Wells Fargo Bank*, 104 F. Supp. 59 (N.D. Cal. 1952); see also Gazzini, *supra* note 114, at 149-50 (citing the Kyoto District Court Decision of 1977, reprinted in 22 JAPANESE ANN. INT'L L. 151 (1978)).



between Austria, Russia, Prussia, and Great Britain and, on the other, Napoleon, who renounced every right to France and accepted the isle of Elba as his new territory.<sup>139</sup> The other treaty was signed by the same Great Powers, on the one side, and by France, represented by Louis XVIII, on the other. The international acts were, thus, two: one stipulated by Napoleon, on behalf of his Court, his family, and his army,<sup>140</sup> and the other by Louis XVIII.<sup>141</sup> The latter would be able to regain for himself and his dynasty the territory of France only after, and partly as a consequence of, the signing of this treaty. After Napoleon's attempt to regain control of France and his confinement to Saint Helen in 1815, Lord Chancellor Eldon, upon the request of the British Prime Minister, wrote an opinion, which is of some interest, on Napoleon's legal status.<sup>142</sup>

If, before the Emperor of Elba [that is, Napoleon] entered France, to regain the throne he was not a French Subject, does his Attempt to regain that Throne again make him a French subject, or a French subject in rebellion – If, upon Grounds resulting out of the various situations & characters, in which [he] has been placed, & with which he has been clothed, you can consider him as, in no way, in the relation of Subject, or subject in rebellion ag[ainst] France, then may not the War be considered as a War against him, ag[ainst] him as our Enemy, without reference to any Character, that he may be alledged [sic] to have, bound up in the national Character of France – against him & his adherents making, as an Enemy against us, an hostile Attempt to break down the System of Gov[ernment], which existed in France, thereby introducing a System of Government in direct subversion of a Treaty with our Allies, founded upon their & our insecurity[,] under any such Government as he would introduce into France? If we can make this out, then might we not steer clear of the difficulty, that belongs to excluding from Peace with France or French Subject or a French Rebel? [H]e would then be a distinct, substantive Enemy, independent of any relation to the Sovereign of France, with whom we might be at Peace, or in Alliance? [A] conquered Enemy indeed, with whom, according to the Law of Nations, we should deal as mercifully as our Security would admit after he was conquered. But then we should only have to determine, as between ourselves & him, whether we did so treat, and the rules of the Law of Nations would be to be applied in the

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139. Elba was not part of France, but rather, *terra nullius* since the extinction of the Ludovisi dynasty. This demonstrates how Napoleon was not restricted to a smaller territory than the one he was governing before; rather, he “migrated” with his court and his (drastically diminished) army. See MIELE, *supra* note 32, at 18.

140. *Traité entre l’Autriche, la Russie et la Prussie, d’une part, et Napoleon Bonaparte de l’autre; avec accession partielle de la Grande-Bretagne*, Apr. 27, 1814, 1 Martens Recueil des Traités 696 (Supp.).

141. *Traité de paix signé entre la France et l’Autriche et ses alliés*, May 30, 1814, 2 Martens Recueil des Traités 1 (Supp.).

142. John Hall Stewart, *The Imprisonment of Napoleon: A Legal Opinion by Lord Eldon*, 45 AM. J. INT’L L. 571 (1951). This opinion was also published and thoroughly explained in GAETANO ARANGIO-RUIZ, *SULLA DINAMICA DELLA BASE SOCIALE NEL DIRITTO INTERNAZIONALE* 103-07 (1954) [hereinafter ARANGIO-RUIZ, *DINAMICA*], where other similar examples are also cited.

decision of that Question of fact, without reference to any Rule of that Law to him as a Subject of any Sovereign?

Great Britain thus considered Napoleon to be the rival "power," a government. Conversely, it considered France not as an enemy, but as an ally.

On March 25, 1815, Austria, Great Britain, Prussia, and Russia had even signed a treaty,<sup>143</sup> to which France acceded,<sup>144</sup> according to which, "having taken into consideration the consequences which the Invasion of France by Napoleon Bonaparte, and the actual situation of that Kingdom [created]," the parties agreed:

to direct in common, and with one accord, should the case require it, all their efforts against [Napoleon], and against all those who should already have joined his faction, or shall hereafter join it, in order to force him to desist from his Projects, and render him unable to disturb in future the tranquility of Europe and the General Peace.<sup>145</sup>

The subject of international law against whom the war had been fought—and won—was Napoleon. He was the government who, once defeated, had been conquered by Britain.<sup>146</sup> Diplomatic correspondence of Joseph de Maistre, diplomat in St. Petersburg on behalf of the Kingdom of Sardinia, dated July 13, 1815 confirms that "Ainsi les alliés déclarent solennement *qu'ils ne font la guerre qu'à sa personne* [that is, Napoleon]; et lorsqu'enfin *sa personne* est tombée sous leurs mains, ils n'en parlent plus!"<sup>147</sup>

Had he been considered a war prisoner, albeit a former head of state, the obligation on Great Britain would have been to send him back to his country. The only explanation is that he was not a subject of France, but that he had somehow elevated himself to a subject of international law.<sup>148</sup>

143. Treaty of Alliance, Mar. 25, 1815, Aus.-Gr. Brit.-Pruss.-Russ., 64 Consol. T. S. 28.

144. *Id.* at 66 (Declarations of the Plenipotentiaries of the Four Powers, Relative to the Accession of the King of France to the Preceding Treaty, May 1815).

145. *Id.* at 31-32.

146. Napoleon had a territory and a population, though small, when he was given the kingdom of Elba. In contrast, he had none on Saint Helen, but this did not prevent Great Britain from considering herself to be in a permanent state of war against him. See ARANGIO-RUIZ, *DINAMICA*, *supra* note 142, at 106-07.

147. 2 JOSEPH MARIE MAISTRE, *CORRESPONDANCE DIPLOMATIQUE DE JOSEPH DE MAISTRE*, 1811-1817 87 (Albert Blanc ed., 1860) (emphasis in original).

148. ARANGIO-RUIZ, *DINAMICA*, *supra* note 142, at 106-07.

### III. POWERS AS SUBJECTS OF INTERNATIONAL LAW

#### A. *Subjects superiorem non recognoscentes*

All the cases analyzed above make up what Max Weber would have called “inconvenient facts,” those which a party to a struggle does not wish to see.<sup>149</sup> Common experience dictates that a state remains the same—retaining the same name, the same position in the international community, the same rights and duties, the same governmental structure—even if it acquires large swaths of new territory<sup>150</sup> or, conversely, loses extensive areas previously under its jurisdiction. Territory and population undoubtedly help in establishing or consolidating a subject of international law and in assisting the subject in claims of being a sovereign center of authority.<sup>151</sup>

The main issue, however, is the effective control over territory and population—and the support that this effective control gives to the idea of being the superior entity.<sup>152</sup> When a subject does not have

149. Max Weber, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 147 (Hans Gerth & Wright Mills eds., 1975).

150. See ENRICO ZAMUNER, LA FORMAZIONE DELLO STATO ITALIANO 47-51 (2002). Zamuner carefully reviews the positions of scholars with respect to the conquest of the Italian peninsula by the Kingdom of Sardinia during the early 1860s by comparing preconceived ideas with documents from that time. One of the conclusions is that the identity of the Kingdom of Sardinia, as a subject of international law, was not altered by the conquest of the other states and by the modification of its name into “Kingdom of Italy.”

151. For an example of the many pronouncements in this sense, see the Aaland Islands case of 1920, where the report of the International Committee of Jurists appointed to study the status of the islands stated that Finland did not become a sovereign state “until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the state” by themselves. LEAGUE OF NATIONS O.J. Spec. Supp. 4, at 8-9 (1920).

152. The often cited Opinion No. 1 by the Badinter Commission regarding the dissolution of Yugoslavia is somewhat misleading. The Commission, in order to reach its conclusion that the Socialist Federal Republic of Yugoslavia was in the process of dissolution, noted three items: (1) the willingness of some republics to attain independence (as such, not an element showing the creation of a new subject); (2) the fact that the “composition and workings of the essential organs of the Federation no longer meet the criteria or participation and representativeness inherent in a federal State” (hardly a sign that a subject of international law is ceasing to exist); (3) the fact that the “recourse to force has led to armed conflict between the different elements of the Federation” and that “the authorities of the Federation and the Republics have shown themselves to be powerless to enforce respect for the succeeding ceasefire agreements.” Only the last item (the loss of effective control by the federal organs) might justify the conclusion that new independent entities were emerging, although the fact that the republics seemed unable to enforce cease-fires might suggest that they

authority over territory or population, as in the case of international organizations or governments in exile, it is granted exceptions from the (territorial) jurisdiction of the state(s) where it is based.

The fact that government is therefore the essential element characterizing states as subjects of international law also explains the common conception that, when no government is effectively functioning, no state actually exists.<sup>153</sup> This is the case for all types of annexations: the government of the annexing country is simply considered to be extending jurisdiction over the territory and population of the annexed country or territory.<sup>154</sup> It is also the case for states ceasing to exist for *debellatio*, a conquest so total that it includes devolution of sovereignty.<sup>155</sup> In all such situations, and in

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were not in control of their internal structures and were not, therefore, subjects of international law. Conference on Yugoslavia, Arbitration Committee, Opinion No. 1, July 4, 1992, 31 I.L.M. 1494.

153. So-called "failed states" are actually governments unable to assert themselves as *superiorem non recognoscentes*. With regard to the confused situation of Somalia and Somaliland, see GERARD KREIJEN, STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA 84-87 (2003); Steve Kibble, *Somaliland: Surviving Without Recognition; Somalia: Recognised but Failing?*, 15 INT'L REL. 3 (2001); Riikka Koskenmäki, *Legal Implications Resulting from State Failure in Light of the Case of Somalia*, 73 NORDIC J. INT'L L. 1 (2004) (not distinguishing, however, the notions of "state" and of "subject of international law"). See also Jan Nemitz, *The Legal Status of the Republika Srpska*, 43(2/3) OSTEUROPA-RECHT 89 (1997) (providing a theoretical analysis of whether the "entity" of Republika Srpska within Bosnia and Herzegovina may be considered able to assert itself as a state under international law).

154. One of the most representative examples of annexation is the German *Anschluss* of Austria in 1938. See, e.g., ROBERT E. CLUTE, THE INTERNATIONAL LEGAL STATUS OF AUSTRIA 1938-1955 (1962); James Wilford Garner, *Question of State Succession Raised by the German Annexation of Austria*, 32 AM. J. INT'L L. 421 (1938); Schausberger, *Der Anschluss*, in ÖSTERREICH - DIE ZWEITE REPUBLIK (Erika Weinzier ed., 1972); Herbert Wright, *The Legality of the Annexation of Austria by Germany*, 38 AM. J. INT'L L. 621 (1944). The Preamble to the so-called 1955 "State Treaty" between Austria and the four Occupying Powers (U.S.S.R., U.S., U.K., and France) explicitly mentions the annexation of Austria and of its "participation in the war as an integral part of Germany." See State Treaty, May 15, 1955, 6 U.S.T. 2369, 217 U.N.T.S. 223. Article 1 implies that, after 1938, Austria did not exist anymore as a subject *superiorem non recognoscentes*: "The Allied and Associated Powers recognise that Austria is re-established as a sovereign, independent and democratic country." *Id.* The same view is taken by HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 262 (1952).

155. 1 D.P. O'CONNELL, INTERNATIONAL LAW 441 (2d ed. 1970). The typical case is that of Germany after the Second World War. See Unconditional Surrender of German Forces, May 8, 1945, reprinted in 1945 AM. J. INT'L L. SUPPL. 169 (1945); see also *Declaration Regarding the Defeat of Germany*, in 7 DOCUMENTS ON AMERICAN FOREIGN POLICY 217 (Leland M. Goodrich & Marie J. Carroll eds., 1947) ("There is no central Government or authority in Germany capable of accepting the responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious Powers."). In July 1951, President Truman expressed his view that "[t]he rights of the Occupying Powers result from the conquest of Germany, accompanied by the disintegration and disappearance of its former government, and the Allied assumption of supreme authority." GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 289 (1957) (quoting the Information Bulletin from the Office of the High Commissioner for Germany, August 1951). In this case, the

many similar ones, the territory and the population continue to exist; however, the state is said to have disappeared because of the lack of an effective and independent government.

A short historical analysis may help to establish a “least common denominator” rule for identifying subjects of international law. Throughout the history of modern international relations, the main feature of subjects of international law has been their ability to assert that they are not subordinates to other authorities; in other words, subjects of international law were those entities *superiorem non recognoscentes*, able not to recognize any superior within the international community. This feature is at the basis of the fact that the international community is not structured as a hierarchical society, but rather as a community of (formal) peers.<sup>156</sup>

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defeat had as a consequence the complete annihilation of the state apparatus—and therefore the lack of any identity of the Reich with the subjects later arisen on the same territory (the German Democratic Republic and the German Federal Republic). This is shown by the fact, for example, that France, the U.K., and the USA decided in 1950 to authorize the West German government to “give effect to” German Reich treaties. See Elmer Plischke, *Reactivation of Prewar German Treaties*, 48 AM. J. INT’L L. 245, 252 (1954); see also Frederik A. Mann, *The Present Legal Status of Germany*, in JAHRBUCH FÜR INTERNATIONALES UND AUSLÄNDISCHES ÖFFENTLICHES RECHT 27 (1948) (concluding that “Germany has ceased to be an independent sovereign state in the sense of international law, but continues to be a state”); Kay Hailbronner, *Legal Aspects of the Unification of the Two German States*, 2 EUR. J. INT’L L. 18, 22 (1991); Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 1945 AM. J. INT’L L. 518 (1945). No relevance can be given, in the international arena, to domestic decisions based on the legal fiction that the Federal Republic of Germany was identical (or “partly identical”) to the German Reich as an “international legal subject.” See, e.g., *Entscheidungen des Bundesverfassungsgerichts [BVERFG]* [Federal Constitutional Court] 36, 1 (16, 22) (F.R.G.), available at <http://www.oefre.unibe.ch/law/dfr/bv036001.html> (last visited Nov. 2004). The decision states that “[d]ie Bundesrepublik Deutschland ist also nicht ‘Rechtsnachfolger’ des Deutschen Reiches, sondern als Staat identisch mit dem Staat ‘Deutsches Reich’, - in bezug auf seine räumliche Ausdehnung allerdings ‘teilidentisch.’” *Id.* But, later on, it states that “[d]ie Deutsche Demokratische Republik ist im Sinne des Völkerrechts ein Staat und als solcher Völkerrechtssubjekt.” *Id.* Therefore, regardless of the statement that there was a German unitary state comprising the territories and populations of Federal Republic of Germany and of the German Democratic Republic, the decision must recognize that the German Democratic Republic “is a state in the sense of international law and, as such, a subject of international law.” *Id.* This entails that the two German states were both independent subjects of international law.

156. The United Nations does not constitute anything short of a world-wide society. See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11). On the general issue of the personality of the United Nations and its consequences, see Gaetano Arangio-Ruiz, *The ‘Federal Analogy’ and U.N. Charter Interpretation: A Crucial Issue*, 8 EUR. J. INT’L L. 1 (1997). Various legal and political scholars have suggested that, since the end of the Cold War, a major “shift” in international relations has occurred which would have led to an increasingly “verticalized” organization of the international community. See, e.g., MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* CH. 2 (2000); Ugo Mattei, *Globalization and Empire: A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 399-402 (2003). In my opinion, these suggestions lack decisive proof in order to be adopted as useful legal theories.

States, as we know them, were born as entities *superiorem non recognoscentes* when weakening political and religious bodies gradually lost their purported universal jurisdiction during the Middle Ages.<sup>157</sup> The expression *ius inter gentes* did not appear until after the Westphalian Peace, when it was used by the English scholar Richard Zouche.<sup>158</sup> Only at this time was there a commonly shared doctrinal acknowledgement of the fact that the *respublica christiana* had broken up into different effective authorities; international law as we understand it could then be conceived.<sup>159</sup> Thus, the only *constitutional* rules of the law of nations are the factual equality of members and their exemption from superior authority. In the international community, the functions of law-making, law-determining, and law-enforcement are not organized in any centralized way.<sup>160</sup>

This is reflected by the statement that states are independent. Independence, in this sense, is the feature distinguishing subjects of international law from other entities. The only possible analogy in this respect, although partial, is not the comparison between states under international law and juridical entities in domestic systems, but rather between states and natural persons.<sup>161</sup> The fact that domestic systems view the state as a juridical person is not sufficient

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157. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 23-28, 36-51 (1947).

158. GIULIANO ET AL., *supra* note 15, at 38.

159. But legal scholars in the previous centuries had already pointed out that, in fact, local authorities were in charge of all the affairs and that the Emperor ruled *de jure*, with no effective power. The formula "*superiorem non recognoscentis*" is a product of this high-level theoretical analysis. See ALBERTO MIELE, 1 *LA COMUNITÀ INTERNAZIONALE (I CARATTERI ORIGINARI)* 45 (2000); CECIL N. SIDNEY WOOLF, *BARTOLUS OF SASSOFERRATO, HIS POSITION IN THE HISTORY OF MEDIEVAL POLITICAL THOUGHT* 371-83 (1913).

160. GAETANO ARANGIO-RUIZ, *THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW* 235 (1979) [hereinafter ARANGIO-RUIZ, *THE U.N. DECLARATION*]. The existence of this constitutional (fundamental) rule does not deny states the possibility to *agree on* and *submit themselves to* certain rules in some fields of conduct. Such agreements, however, do not have more authority to change the fundamental structure of the international community than normal contracts have to change the fundamental legal order within a country.

161. According to all systems of modern legal practice, a juridical entity (such as an organization, a company, a trade union, a political party, or even a federated state) within a domestic system derives its existence, and its rights and duties, from its recognition by the law and, therefore, by the system itself. In this process of constitutive recognition, the state is (must be) superior to the entity in order to be able to recognize it and its acts. Most philosophical and political theories have, on the contrary, abandoned the view that a human being can be denied its status according to the will of the state; human beings are persons as such: states just take them as given, and then attach rights and duties to them. For a complete discussion of this theory applied to international law, see GAETANO ARANGIO-RUIZ, *GLI ENTI SOGGETTI DELL'ORDINAMENTO INTERNAZIONALE* 98-108, 373-409 (1951).

to transfer this approach to the arena of international relations. "The Law of the Nations is but private law 'writ large.' It is an application to political communities of those legal ideas that were originally applied to the relations of individuals. Its leading distinctions are therefore naturally those with which private law has long ago rendered us familiar."<sup>162</sup> International law takes states for granted and does not prescribe a model they need to follow in order to be recognized as states.<sup>163</sup> This does not necessarily mean, especially in the past sixty years, that international law has not come to prescribe anything on how a country should be governed. These prescriptions, however, do not impeach the fact that a state is a subject within the international community; these prescriptions, in effect, presuppose this membership.<sup>164</sup>

Vattel described this situation in the following terms:

[U]n Etat est . . . un corps politique. . . . Toute nation qui se gouverne elle-même, sous quelque forme que ce soit, sans dépendance d'aucun étranger, est un Etat souverain. . . . Pour qu'une nation ait droit de figurer immédiatement dans cette grande société, il suffit qu'elle soit véritablement souveraine & indépendante, c'est-à-dire qu'elle se gouverne elle-même, par sa propre autorité & par ses lois.<sup>165</sup>

By the end of the eighteenth century, the idea that recognition would somehow create (or help establish) other states was therefore implicitly rejected because the intrinsic equality among sovereign states rendered such a process impossible.

The analysis by Vattel on the status of international law during his time, moreover, is relevant both to the issue of subjects of international law other than states and especially to the subjects arising from an insurrection or a civil war. Vattel clarifies that rebels are "sujets qui prennent injustement les armes contre le conducteur de la société"<sup>166</sup> and that the Sovereign has a right to repress them.<sup>167</sup> Nonetheless, if an insurgency is strong enough (because it stops obeying the sovereign and resists him) and it forces the sovereign to make war to try to defeat it,<sup>168</sup> then a civil war starts, and the civil war "fait naitre deux parties indépendans," that is, gives birth to two independent parties, both subjects of international law. The fact that they are two subjects of international law derives from the

162. THOMAS E. HOLLAND, *STUDIES IN INTERNATIONAL LAW* 152 (1898).

163. MIELE, *supra* note 32, at 5.

164. Arangio-Ruiz, *Dualism Revisited*, *supra* note 19, at 949-51.

165. 1 EMMERICH DE VATTEL, *LES DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉS À LA CONDUITE & AUX AFFAIRES DES NATIONS & DES SOUVERAINS* 11-12 (1775).

166. 3 *id.* at 129.

167. *Id.* at 130.

168. *Id.* at 132.

acknowledgement that they regard themselves as enemies and do not recognize any common authority to judge them. That is, they are both *superiorem non recognoscentes*, and the same obligations existing between states apply to the parties of a civil war.<sup>169</sup> It is noteworthy that Vattel wrote this at about the time of the successful rebellion of the thirteen U.S. colonies against British rule; his book aptly describes the course of the war of independence on that occasion and provides a fundamental tool for understanding similar events.

A few years later, William Blackstone described the subjects of international law in essentially the same way:

[A]s it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse called 'law of nations': which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any.<sup>170</sup>

Another principle follows from the idea that states do not recognize a higher authority—namely, that each state is to treat other states as equal legal subjects. This concept, too, is challenged from time to time on the basis of political considerations, but strictly speaking, on legal grounds, general international law cannot accept such pretensions without losing its very meaning.<sup>171</sup>

Vattel refers to states and other groups (what today we would call “belligerents”). Blackstone apparently refers only to states and not to insurgents or belligerents. Nonetheless, when he refers to the lack of superior recognized authority, he is taking into account all self-proclaimed effective governments not recognizing any superior. Therefore, subjects of international law are such only when they are actually *superiorem non recognoscentes*, i.e., when they are able to

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169. *Id.* at 132-33. The expression “*superiorem non recognoscentes* (-ntes in the plural)” explains the claims of medieval local rulers to act independently in respect of the Emperor and of the Pope. See, e.g., Kenneth Pennington, *Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept*, 20 SYRACUSE J. INT'L L. & COM. 205, 214 (1994). Today, the expression is used to describe entities acting independently on the international arena. See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 397 (1986) (discussing the progressive replacement of this principle with a concept of international law based on a more energetic sense of community).

170. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 42 (14th ed. 1803) (emphasis added). Although reference apparently is made by the English scholar to “mankind” as constituting the population of the world and the states, the stress is then exclusively put on the fact that these states (or, rather, their governments) do not recognize any superior authority. No relevance is placed on population or territory as qualifying, or essential, elements of these subjects.

171. See UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 117-95 (Michael Byers & Georg Nolte eds., 2003) (appraising the contemporary interplay between this fundamental principle of international law and the hegemonic pretensions of the United States).



act, in principle, with no superior entity restricting them, unless they have accepted those restrictions. Such a statement logically implies a minimum of internal organization allowing each entity to act as a whole, as one subject vis-à-vis others. There is at least a *prima facie* case that no element other than this understanding of sovereignty (for example, territory, population, intercourse with other entities, recognition) defines a subject of international law.

### B. Intergovernmental Organizations and Other Subjects

States are, therefore, one class of the many entities *superiorem non recognoscentes*. Although territory and population distinguish them on the descriptive level from other subjects, no *essential* differentiation is warranted with respect to the legal status of entities that may lack, at some point in their existence or even at all times, a stable territory or population (or both).

This is further illustrated by the fact that rules of general international law also apply, with the necessary adjustments, to intergovernmental organizations (IGOs). In their case, too, international legal personality does not flow from recognition by other subjects of international law or from the simple recognition of that international personality by the member states in the establishing treaty. It is only when the formal establishment of the IGO is followed by its effective possibility to act independently as a distinct subject that international legal personality actually ensues.<sup>172</sup> From that moment onward, the organization also acquires a personality distinct from those of its member states, at least as long as it is able to maintain such *de facto* independence.<sup>173</sup> It is therefore not clear why the view is widely held that intergovernmental organizations are not among the “primary players” in international law.

In fact, the International Court of Justice has stated that IGOs are bound not only by their constitutive instruments and by the treaties they conclude, but also by “any obligations incumbent upon them under general rules of international law.”<sup>174</sup> IGOs are therefore generally subject to all rules pertaining to other subjects, except those not applicable to them for factual reasons in the specific circumstances of each case. For example, when an IGO—which usually does not control any territory—exercises the functions of a government over a territory and a population, e.g. East Timor (through UNTAET)<sup>175</sup> and Kosovo (through UNMIK),<sup>176</sup> it is deemed

172. ARANGIO-RUIZ, THE U.N. DECLARATION, *supra* note 160, at 243-46.

173. *Id.* at 246-48.

174. Agreement between the WHO and Egypt, 1980 I.C.J. 67, ¶ 37.

175. On October 25, 1999, the U.N. Security Council adopted Resolution 1272, establishing a United Nations Transitional Administration in East Timor (UNTAET)

to be subject to all customary rules pertaining to the treatment of nationals by states, even though such regimes are not deemed to possess full-fledged sovereignty over those territories.<sup>177</sup> UNMIK, for instance, was deemed to be subject to human rights standards applicable to European states.<sup>178</sup> To be able to enjoy immunity from responsibility arising out of the misconduct of its agents in those territories—much like the state it was replacing had tried to do in the past—UNMIK was forced to have recourse to carefully drafted immunity instruments, and this shows that immunity would not automatically follow from the traditional immunity of organizations.<sup>179</sup> UNMIK even signed a technical act with the Council of Europe relating to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which allows an independent committee of experts to examine the treatment of persons in Kosovo deprived of their liberty by UNMIK.<sup>180</sup>

Another borderline example is the International Committee of the Red Cross (ICRC), an international non-governmental organization (created by individuals, not states) recognized as an independent holder of rights and duties, acting as a peer to states in

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“endowed with overall responsibility for the administration of East Timor and . . . empowered to exercise all legislative and executive authority, including administration of justice.” Sec. Res. 1272, U.N. SCOR, 4057th mtg. at 2, ¶ 1, U.N. Doc. S/RES/1272 (1999).

176. On June 10, 1999, the U.N. Security Council adopted Resolution 1244, establishing a U.N. Interim Administration Mission in Kosovo (UNMIK), including a wide range of specifically indicated responsibilities. Sec. Res. 1244, U.N. SCOR, 4011th mtg. at 2, ¶ 11, U.N. Doc. S/RES/1244 (1999). The first legislative act by UNMIK clarified that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK.” UNMIK Reg. 1999/1, at 1, U.N. Doc. UNMIK/REG/1999/1 (1999).

177. See Andreas Zimmermann & Carten Stahn, *Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo*, 71 NORDIC J. OF INT'L L. 423, 425-29 (2001); see also Michael Bothe & Thilo Marauhn, *U.N. Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration*, in KOSOVO AND THE INTERNATIONAL COMMUNITY, A LEGAL ASSESSMENT 217 (Christian Tomuschat ed., 2002); Michael Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76 (2001).

178. The Ombudsperson Institution in Kosovo has repeatedly denounced alleged misconduct by UNMIK—considered a “surrogate state” (or, rather, a “surrogate government”)—against Kosovo residents. See Jonas Nilsson, *UNMIK and the Ombudsperson Institution in Kosovo: Human Rights Protection in a United Nations “Surrogate State,”* 22 NETHERLANDS Q. HUM. RTS. 123 (2004).

179. In a similar way, although “blue-helmet” U.N. peace-keepers are not generally regarded as combatants, it is suggested that the rules of armed conflict apply to forces authorized by the U.N. when they are “engaged in hostilities as a belligerent.” See Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT'L L. 185, 188 (1996).

180. Press Release, UNMIK, SRSO Soren Jessen-Petersen and Walter Schwimmer, Secretary-General of the Council of Europe, Sign Two Agreements (Aug. 23, 2004), available at <http://www.unmikonline.org> (last visited Nov. 2004).

international relations and having as its main objective the protection of certain individuals during armed conflict.<sup>181</sup> According to Article 9 of the First, Second, and Third 1949 Conventions and Article 10 of the Fourth Convention, the ICRC is entrusted with the mandate of providing relief to victims of armed conflict. Article 81 of Additional Protocol I strengthens this right of initiative by imposing upon states obligations to cooperate with the ICRC. The ICRC has signed treaties, such as the "Agreement between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland" of March 19, 1993,<sup>182</sup> which provides for almost all of the immunities usually enjoyed by intergovernmental organizations. These cases, which are representative of many similar ones, show that nothing prevents subjects that *appear* different from states from having rights and obligations traditionally attributed to states only.

### C. *Is There a Real Difference in the Treatment of State and Non-State Actors?*

One of the main problems of the traditional view espoused in the *Restatement* is that most scholars derive from this definition the consequence that if an entity does not meet the criteria to be considered a state, it is, at best, a "minor" subject of international law; in extreme cases, it might not be regarded a subject of international law at all. In the face of this problem, uncertainties are posed by those entities that do not fulfill the traditional criteria of "states" but nevertheless act in the international arena with all the rights and duties they can effectively possess.<sup>183</sup>

One possible approach may be to identify what the "least common denominator" of these subjects really is—namely, effective sovereignty. The proposal is to use the word "powers" to define all

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181. See, e.g., GEORGES WILLEMIN & ROGER HEACOCK, *THE INTERNATIONAL COMMITTEE OF THE RED CROSS: INTERNATIONAL ORGANIZATION AND THE EVOLUTION OF WORLD SOCIETY* 199-202 (1984); Allan Rosas, *Notes on the Legal Status of National Red Cross Societies*, in CHRISTOPHE SWINARSKI & JEAN PICTET, *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET* 959, 960-64 (1984).

182. The text of the treaty is available at <http://www.icrc.org> (last visited Nov. 2004).

183. Scholars have dealt with this problem in different ways. See, e.g., Eric Suy, *New Players in International Relations*, in *STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE* 373-83 (Gerard Kreijen ed., 2002). The need to move beyond the idea of an international legal system essentially made up of sovereign states is also highlighted by Penelope Simmons, *The Emergence of the Idea of the Individualized State in the International Legal System*, 5 *J. HIST. INT'L L.* 293, 334-35 (2003).

those subjects that are effectively able not to recognize any entity as their superior.<sup>184</sup>

In this sense, all powers are equal under international law because governments as such do not differ from one another, although their territorial basis may vary greatly. The formal equality of subjects—like the formal equality of human beings before domestic systems—does not prevent huge differences in wealth, size, or age. Thus, for example, a non-state power without a territory is not subject to the rules of international law governing territory for the simple reason that it does not have a territory. Similarly, a state without coastlines is not subject to the rules governing, for example, territorial waters; this does not imply that that state is essentially different from other states with coastlines, but only that a difference of fact confines its rights and duties. Should that state acquire, legally or not, a coast, its essence would not be modified; rather, it would have new rights and duties flowing from that new factual position. In both cases, there is no need to create a special category of subjects construed as qualitatively “inferior” to states. The addition of new subjects to the international community (usually identified as transnational corporations, human rights’ NGOs, and financial IGOs), even if true, would be only an “environmental change,” not a “systemic change.”<sup>185</sup>

With respect to the “hegemonic” pretensions of certain states during certain phases of the history of international relations,<sup>186</sup> formal equality may at times be challenged by the material ability of one or more players to use legal rules, and even to develop new laws, for their own purposes. But in this day and age this appears to be the case almost exclusively within IGOs, and within the United Nations’ system in particular. These treaty-based organizations are not an accurate reflection of what the international community is like, and they do not have any direct effect on the “constitutional” framework of the international community.<sup>187</sup>

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184. The term “power” is used as a synonym of “independent entity participating in international relations.” Arangio-Ruiz, *Dualism Revisited*, *supra* note 19, at n.89.

185. Richard H. Steinberg, *Who is Sovereign?*, 40 STAN J. INT’L L. 329, 334 (2004).

186. For a legal definition of “hegemonic international law,” see Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873 (2003); Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT’L L. 843 (2001).

187. This difference does not appear to be fully understood by some authors, who compare hegemonic pretensions by Great Powers in past centuries with the present structure of the United Nations, where some countries have a special position not because they are essentially different, but *on the basis of the provisions of the U.N. Charter*. See, e.g., GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES 91-131, 165-93, 352-53 (2004). To argue that this distinction is not relevant because practically all states are today members of the U.N. misses the point for various reasons. First, newly created states do not necessarily join the organization immediately; their status before they do so is clearly extremely important. Second, as the case of Yugoslavia has

D. *Effective Authority*

Each authority *superiorem non recognoscens* is a subject formally at the same level of the others and is also a subject forming part of the so-called "international community." The question is, therefore, what exactly is this authority *superiorem non recognoscens*? What exactly is a power in the sense of international law? It is not the individual persons making up the government, apart from rare instances (e.g., Napoleon); nor it is a specific government as such. Rather, it seems to be a government as the expression of a system that reasonably considers itself identical to previous ones in relation to other subjects of international law. In this sense, the Soviet government after the October Revolution may be considered a new government, a new power vis-à-vis the international community. Its willingness and ability to mark its differences with the previous governments (the Tsarist one and the *ad interim* one between February and October), even against widespread protests, show that the new Soviet power did make its case for discontinuity.<sup>188</sup> In contrast, for example, the Islamic Revolution in Iran, which led to the establishment of a radically new government, accepted its continuity with the previous governments, as shown by the many awards rendered by the Iran-U.S. Claims Tribunal citing the position of Iran itself in the international arena.<sup>189</sup> In this case, there is a succession of governments, in the domestic sense, without any change in state identity (in the meaning of international law). A factual analysis

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shown, there might be specific periods when U.N. membership of a state is contentious. In fact, it has been argued that the "Federal Republic of Yugoslavia" was barred from U.N. membership in 1992, as the Security Council and the General Assembly rejected its claim to continue the membership of the Socialist Federal Republic of Yugoslavia. The Resolutions required Yugoslavia (Serbia and Montenegro) to apply for membership as a new state. See S.C. Res. 777, U.N. SCOR, 47th Sess., 3116th mtg., U.N. Doc. S/Res/777 (1992); G.A. Res. 47/1, U.N. GAOR, 47th Sess., Agenda Item 8, U.N. Doc. A/Res/47/1 (1992). Third, not all subjects of international law are "states" according to the definition provided by the Restatement and by the Montevideo Convention.

188. The fact that the U.S.S.R. was unanimously considered bound by previous (tsarist) debts and obligations does not necessarily contradict this reasoning. In fact, a rule of compulsory continuity of obligations has developed during the XIX and XX centuries with regard to instances of state succession and has been recently applied in a consistent manner to the cases of the dissolution of U.S.S.R., Yugoslavia, and Czechoslovakia. See Guido Acquaviva, *The Dissolution of Yugoslavia and the Fate of Its Financial Obligations*, 30 DENV. J. INT'L L. & POL'Y 173, 213-14 (2002).

189. Thus, assertions made by the subject involved provide one of the tools to establish whether, for example, a revolution had the effect of destroying the identity of the subject of international law. See the case of Iran after the revolution of 1979, as decided by the Iran-U.S. Claims Tribunal in the case *United States v. Iran*, where the Tribunal based its reasoning that "[t]he revolutionary changes in Iran fall under the heading of State continuity, not State succession" on the previous finding that "Iran does not assert that its situation is one of State succession." 32 Iran-U.S. Cl. Trib. Rep. 162, 176 (1996).

must be carried out by legal scholars and practitioners on a case-by-case basis to assess all relevant facts in light of the law.

As is shown by the cases in which there is continuity between a non-state actor and a state actor (e.g., the Czechoslovak National Council and all cases in which a liberation movement seizes power over a state), both state and non-state "powers" are *superiorem non recognoscentes*. This definition of sovereignty constitutes, in theory, only a display of *effective authority*.<sup>190</sup> The pivotal requirement, for state and non-state actors alike, to be regarded as subjects of international law and to be able to assert identity is an effective display of authority.<sup>191</sup> In this sense, there is no real dichotomy of "form" and "fact." An entity needs to be in fact *superiorem non recognoscens* to become a formal peer in international relations. Should the entity lose its *de facto* ability to exclude other subjects, it will also lose its formal status as a subject of international law.

To understand whether this effective authority is actually exercised, two alternative tests can be used: authority within the entity itself or relations with other subjects on a level of formal equality. When the former test is met, an entity is a power, a subject of international law. If the first test is not met—because of the lack of data or inconclusive evidence—one might turn to the second one that, however, only provides for a rebuttable presumption that an entity is indeed a subject of international law. The first helps to understand the true reality of things in cases such as Taiwan, when recognition is withheld on political grounds. The second is particularly relevant in understanding dubious cases of effective authority, such as those of the Holy See or Napoleon. These tests should not be understood as part of the definition of what a subject of international law is; rather, they should be used as evidence to make this finding, which is essentially factual in nature.

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190. The decisions of various domestic courts denying that artificial islands declaring their "independence" can be regarded as states under international law appear, therefore, to miss the mark in holding that these entities are not states because of the lack of land or of a "cohesive community." See, e.g., the German case *In re Duchy of Sealand*, 80 I.L.R. 683 (1978) and the Italian case *Chierici v. Ministry of the Merchant Navy*, 71 I.L.R. 258 (1969). In all such cases, the entities considered were not subjects of international law only because they were not able to establish themselves as *superiorem non recognoscentes*.

191. In cases of states, this is expressed by saying that government is "the most important single criterion of statehood, since all others depend on it." JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 42 (1979); see also Chantal Charpentier, *Les déclarations des Douzes sur la reconnaissance des nouveaux États*, in 96 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 343, 351 (1992).

## IV. SHIFTING THE FOCUS TO RESPONSIBILITY

One of the ways to gather evidence on effective authority by a subject is to shift the attention from issues of personality to issues of responsibility. It has been pointed out that when the law is "confronted with nasty behaviour from entities that are not generally to be considered states, [it] runs into problems."<sup>192</sup> States try to restrict IGOs by, for example, drafting conventions on their behalf that unreasonably modify the rules applicable to all subjects.<sup>193</sup> States also try to introduce distinctions between inter-state conflicts and other conflicts,<sup>194</sup> although authoritative interpretation of legal instruments increasingly stresses that, in the most fundamental areas, the difference in regime between states and other subjects of international law is narrowing.<sup>195</sup> In addition, this "statist" prejudice creates the problem of unreasonably limiting the scope of important instruments in preventing crimes *jure gentium*.<sup>196</sup> But an attempt can be made to apply the basic concepts of responsibility to the international community.<sup>197</sup> An entity is not ultimately responsible

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192. Jan Klabbers, *(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors*, in *NORDIC COSMOPOLITANISM* 351, 354 (Jarna Petman & Jan Klabbers eds., 2003).

193. *Id.* at 356 (providing examples of "childish" behavior in the drafting of the "Convention of the Law of Treaties between States and International Organizations or between Organizations" and the treatment of United Nation's *laissez-passer*).

194. Compare Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 8, 1978), with Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. See also LIESBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 14-26 (2002) (discussing the obligations of armed groups under inter-state treaties); Christine Byron, *Armed Conflicts: International or Non-International?*, 6 *J. CONFL. & SECURITY L.* 63 (2001); Theodore Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT'L L.* 239, 260-75 (2000) (discussing the different nature of the two Protocols and their threshold of application).

195. See *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96-137 (ICTY App. Chamber 1995) (stating that article 3 common to the four Geneva Convention of 1949 is applicable to all armed conflicts, whether international or non-international in nature).

196. See, e.g., Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?*, 19 *N.Y.L. SCH. J. INT'L & COMP. L.* 413, 444 (2000) (pointing out that one of the most widely accepted definitions of aggression envisages that only individuals affiliated with states can be responsible for that crime, thus excluding terrorists, insurgents, revolutionary groups, and other non-state actors).

197. See Draft Article on State Responsibility, Report of the International Law Commission on the work of its 53rd session, U.N. GAOR, 56th Sess., Supp. No. 10, Ch. IV.E.1, U.N. Doc. A/56/10 (2001). The fact that these articles are meant only to apply

when it is dependent on another to act, when it is not genuinely in control of its own decisions, or when it derives its existence and powers from another entity's authority. For the purposes of international law, it is not a subject. In other cases, however—such as with states, de facto governments, belligerents, and IGOs—subjects are, in fact, held responsible under international law. This is because they have effectively established their authority as “superior.” They consequently deserve to be endowed with rights and duties under international law.

Thus, by expanding the wording of articles 5 to 10 of the Draft Articles on State Responsibility<sup>198</sup> and applying the same principles

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to states does not prevent their use as evidence that these principles are binding upon other subjects, too. Draft Article 33 provides:

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach. 2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

*Id.* art. 33.

198. Article 5 of the Draft Articles on State Responsibility provides:

**Conduct of persons or entities exercising elements of governmental authority.** The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

*Id.* art. 5. Article 6:

**Conduct of organs placed at the disposal of a State by another State.** The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

*Id.* art. 6. Article 7:

**Excess of authority or contravention of instructions.** The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

*Id.* art. 7. Article 8:

Conduct directed or controlled by a State. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

*Id.* art. 8. Article 9:

**Conduct carried out in the absence or default of the official authorities.** The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in



to non-state actors, it follows that entities, organs, or persons that exercise only *derived* authority—as opposed to *sovereign* authority—are not themselves responsible under international law. The Commentary to the Draft Articles on State Responsibility clarifies that “no government can be held responsible for the conduct of rebellious groups committed in violation of its authority” and that this is “premised on the assumption that the structures and organization of the movement are and remain independent of those of the State.”<sup>199</sup>

For example, Turkey was deemed responsible by the European Court of Human Rights for violations of human rights that occurred in the Turkish Republic of Northern Cyprus, an entity under its actual authority.<sup>200</sup> It was not possible for Turkey to “shift the blame” to the purported authorities of Northern Cyprus because international law looks at the reality of the situation, not at the cloaks devised for political purposes. This is not different from what happens when a state within a federation infringes upon the rights of a foreign country: the federation answers for the international

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fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

*Id.* art. 9. Article 10:

**Conduct of an insurrectional or other movement.** 1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law. 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

*Id.* art. 10.

199. Commentary on the Draft Articles on State Responsibility, Report of the International Law Commission on the work of its 53rd session, U.N. GAOR, 56th Sess., Supp. No. 10, Ch. IV.E.2, at 112-13, U.N. Doc. A/56/10 (2001); *see also* Responsibility of International Organizations, Report of the International Law Commission on the work of its 56th session, U.N. GAOR, 59th Sess., Supp. No. 10, at 102-09, U.N. Doc. A/59/10 (2004).

200. *See* *Loizidou v. Turkey* (Admissibility), 310 Eur. Ct. H.R. (ser. A), ¶¶ 62-63 (1995). The court stated:

[T]he responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration. . . .

*Id.*

breach.<sup>201</sup> In contrast, acts by the Taiwanese authorities are not imputed to the PRC government, for the simple reason that the latter lacks effective control over the former. And it would be fundamentally unjust to do so.<sup>202</sup>

The necessary condition for an entity to be considered a “power,” a subject of international law, seems to be the fact that the entity is able to establish itself as *superiorem non recognoscens*, as an entity that engages in relations as a peer with other subjects and that, therefore, is held responsible when it causes damage. The best way to understand if an entity is really *superiorem non recognoscens* and if it is indeed a subject of international law (whether the international community agrees to calling it “state” or not) is the fact that breaches emanating from its “organs”—considered in the broadest terms—are imputed to that entity, and not to others.<sup>203</sup> Thus, although from a logical standpoint personality comes before responsibility, the latter is a means to carry out the complex empirical analysis needed to establish whether an entity is sovereign.

This explains why Napoleon was considered to be, at a certain point and regardless of his relationship with the territory and population of France, a subject of international law: he was able to create “international” problems, raising the concerns of Great Britain, Austria-Hungary, and Russia. Similar cases are those of the Franco regime before the conquest of Madrid and of the Confederates during the U.S. Civil War: in both cases entities rebelling against the central authorities reached a degree of *power* and *authority* such that the opponent, and the international community, could no longer deal with them as an internal matter. Acts by these entities had international consequences that could not be ascribed to any other existing international subject, not even using the *fictio* of vicarious responsibility. They had become subjects under international law.

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201. See *Lynchings of Italians at New Orleans and Elsewhere*, in MOORE, *supra* note 91, at 837-49 (describing the controversies arising from the failure to prevent and punish the lynching of some foreign nationals by various U.S. states which led to the recognition of responsibility by the United States’ government).

202. One would just need to consider, for example, the absurdity of attributing to the PRC a breach of the rule of international law prohibiting aggression in the unlikely event of Taiwanese armed attack against Japan. In this hypothetical case, a state of war would *not* exist between Japan and the PRC. On the contrary, should the Texas State Guard invade Mexico under orders by the Governor of Texas, the act—absent a finding that Texas amounts to an “insurrectional or other movements,” and thus a subject of international law itself—would be internationally ascribed to the United States of America.

203. On this issue, see the fundamental considerations already in ROLANDO QUADRI, *DIRITTO INTERNAZIONALE PUBBLICO* 534-35 (5th ed. 1968).

## V. CONCLUSIONS

Hobbes suggested that “[b]efore the names of Just, and Unjust can have place, there must be some coercive power.”<sup>204</sup> In fact, the monopoly on the use of force within a certain territory is one of the traditional ways through which entities have asserted themselves as subjects of international law, although by no means the only one. From the moment an entity is *superiorem non recognoscens*, discourse on its rights, duties, and responsibilities under international law may begin. It is submitted that this is the characterization that should be applied in order to establish whether an entity is indeed a power, a subject of international law, especially in dubious cases such as internal disturbances developing into civil wars<sup>205</sup> and the case of al-Qaeda.<sup>206</sup> With regard to the latter, the U.S. government has recently suggested that

there is an international armed conflict, but it is not just about the Taliban and Afghanistan. . . . [I]t is about the international terrorist organization Al Qaida. Al Qaida has conducted attacks across the globe. . . . This is truly a global war against a determined, organized, and capable enemy.<sup>207</sup>

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204. THOMAS HOBBS, *LEVIATHAN* 95 (J.C.A. Gaskin ed., Oxford Univ. Press 1998) (1651).

205. See *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgment (ICTY 2003). The judgment states that the “Croatian Community of Herceg-Bosna” had de facto authority on a portion of Bosnia and Herzegovina for some time after April 10, 1992, and it waged an armed conflict with the army of Bosnia and Herzegovina controlled by Sarajevo. *Id.* ¶¶ 15-16, 25. Similarly, on June 16, 2004, Trial Chamber III of the same Tribunal found that the prosecution had adduced sufficient evidence such that a trier of fact could reasonably conclude that there was an “armed conflict” in Kosovo prior to March 24, 1999, thus implying that the Kosovo Liberation Army (KLA) was an “organized armed group,” a subject of international law. See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶¶ 14-40 (ICTY 2004).

206. On the background of al-Qaeda and its relations with the Taliban regime in Afghanistan, see Hiram Abtahi, *From the Destruction of the Twin Buddhas to the Destruction of the Twin Towers: Crimes Against Civilization under the ICC Statute*, 4 INT’L CRIM. L. REV. 1, 3-7 (2004); U.S. National Commission on Terrorist Attacks upon the United States, *Overview of the Enemy* (July 16, 2004), available at <http://www.9-11commission.gov/hearings/hearing12.htm> (last visited Nov. 2004). Suggestions have indeed been made that “Al Qaeda . . . has evolved into something like a virtual Islamist state that is trying to find a permanent place for itself in the actual world. . . .” Lawrence Wright, *The Terror Web*, NEW YORKER, Aug. 2, 2004, at 40, 53. The U.S. Supreme Court has spoken of a mission of the United States Armed Forces to “subdue al Qaeda.” *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004).

207. *United States v. Hicks, Prosecution Response to Defence Motion: Armed Conflict in Afghanistan Has Ended* (Oct. 15, 2004), available at

Going back to the definition of “state” presented at the beginning of this Article—the one enshrined in the Montevideo Convention and substantially adopted by the *Restatement*—it is true that the three (or four) elements may *generally* assist in the determination of whether a certain entity is indeed a state. Not being a “state,” however, does not mean not being a “power” with all the rights and duties that, through an empirical study, can be found to be applicable pursuant to customary international law. For example, customary rules on international responsibility should be deemed to apply to any “power” regardless of whether all elements making up a state do exist in the specific circumstances.<sup>208</sup> Fundamental rules on armed conflict would also apply.<sup>209</sup> Moreover, general rules on non-interference in internal affairs—except, of course, in cases of armed conflict—might be applicable, as well. In this sense, U.S. court decisions relating to the Civil War,<sup>210</sup> among others, show that states usually recognize transactions in the ordinary course of civilian life (e.g., investments, contracts, marriages) carried out under the laws of the subjects of international law against whom they are fighting, insofar as they are not closely related to the war effort.<sup>211</sup> Rules of international law

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<http://www.defenselink.mil/news/Oct2004/d20041026motion.pdf> (last visited Nov. 2004).

208. See Michael Schoiswohl, *De Facto Regimes and Human Rights Obligations – The Twilight Zone of Public International Law?*, 6 AUSTRIAN REV. INT’L & EUR. L. 45, 85-90 (2001) (containing suggestions relating to international human rights obligations).

209. See LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 52-58 (2002). Moir states that insurgents are bound by Common Article 3 of the Geneva Conventions of 1949 because the content of this article is now part and parcel of customary international law. This would imply that customary international law regarding armed conflict is automatically binding on all subjects able to wage an armed conflict. See also *supra* notes 34, 44 (regarding the participation of the Holy See and of the Sovereign Order of Malta to conventions and conferences related to the conduct of hostilities). The same conclusion seems to have been also implied when Czechoslovakia was recognized as a winning power of the First World War. See *supra*, notes 67-68 and accompanying text. The “conflict” between the U.S. and al-Qaeda is improperly characterized as “international” by the prosecution in the case *U.S. v. Hicks*, and one wonders whether the U.S. government has thoroughly considered the possible consequences of such a qualification. See *supra* note 207 and accompanying text. It is noteworthy, however, that even the characterization of the struggle as a “conflict” lends support to the claim that al-Qaeda is indeed a subject of international law, though not necessarily a state.

210. See *supra* notes 100-01 and accompanying text.

211. This appears to be the application of that rule of international law which, according to certain scholars, mandates the recognition of “internal” acts of non-recognized governments. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 205(3) (1987); see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 125 (June 21); *In re Al-Fin Corporation’s Patent*, [1970] Ch. 160, 177-81 (Apr. 2, 1969); *Hopkins v. United Mexican States*, 4 U.N. Rep. Int’l Arb. Awards 41 (1926); PAUL GUGGENHEIM, *RÉPERTOIRE SUISSE DE DROIT INTERNATIONAL PUBLIC: DOCUMENTATION CONCERNANT LA PRACTIQUE DE LA CONFÉDÉRATION EN MATIÈRE DE DROIT INTERNATIONAL PUBLIC, 1914-1939* 484-85 (1975) (reprinting the

relating to territory and jurisdiction would only apply to subjects enjoying effective control on portions of land.<sup>212</sup>

In short, the presumption should be that state and non-state actors enjoy, in principle, the same rights and duties; the distinction between state and non-state actors remains important only because states—in devising treaties to codify and further international law—are fighting hard to maintain it. The international community is a much more complex environment than many are ready to acknowledge.

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decision of June 4, 1926, by the Section of public law of the Swiss Federal Tribunal in *Schinz v. Tribunal Superior de Zurich*).

212. Thus, for example, when an IGO governs a portion of territory, rules of customary international law relating to governing territory and population would apply. See *supra* note 178 and accompanying text. When an entity does not have a territory, rules pertaining, for example, to mail regulations are not applicable. See *supra* note 44 and accompanying text.